Supreme Court, U.S.
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Supreme Court of the United States

DONNA KAY BUSCH,
Petitioner,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the "reasonableness" of the restriction, rather than a compelling interest.

PARTIES TO THE PROCEEDING

Petitioner is Donna Kay Busch, in her individual capacity and as the parent and next friend of Wesley Busch, a minor. Respondents are Marple Newtown School District; Marple Newtown School District Board of Directors; Robert Mesaros, Superintendent of the Marple Newtown School District; and Thomas Cook, Principal of Culbertson Elementary School.

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PETITION FOR A WRIT OF CERTIORARI

Donna Kay Busch, in her individual capacity and as the parent and next friend of Wesley Busch, a minor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 1a-41a) is reported at 567 F.3d 89. The opinion of the district court (Pet. App., *infra*, 42a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2009. On August 21, 2009, Justice Alito

extended the time within which to file a petition for a writ of certiorari to and including September 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

Petitioner Donna Kay Busch brought suit against respondents in the United States District Court for the Eastern District of Pennsylvania, contending, *inter alia*, that respondent Marple Newtown School District (Marple Newtown) restricted speech in a manner that violated the Free Speech Clause of the First Amendment. The district court granted summary judgment to respondents, Pet. App. 42a-88a, and a divided panel of the Third Circuit affirmed, *id.* at 1a-41a.

A. "All About Me" Classroom Exercise

At the time of the events giving rise to this action, Wesley Busch was a kindergartener in the Marple Newtown School District. As part of the kindergarten unit of study, Marple Newtown included a classroom exercise known as "All About Me." C.A. App. 857-58. There were two stated objectives for the "All About Me" exercise: the first was for students to

identify individual interests and learn about others, and the second was for students to identify sources of conflict with others and ways that those conflicts could be resolved. *Id.* at 919. "All About Me" had been an informal part of Marple Newtown's curriculum for many years and was officially codified as part of the curriculum in 2004. *Id.* at 1007. Each kindergarten teacher had the authority to design lessons for "All About Me" and to determine whether to allow parent participation. *Id.* at 86. Consequently, choices relating to specific classroom activities were generally left to each teacher. *Ibid.*

B. Jaime Reilly's Kindergarten Class

Wesley's kindergarten teacher for the 2004-05 school year was Jaime Reilly. C.A. App. 1155-56. Ms. Reilly implemented "All About Me" by featuring a different student each week. *Id.* at 1079. Thus, each student was able to enjoy his or her own "All About Me" week. *Ibid.* During the selected student's week, the student was given the opportunity to share his or her interests with the class through multiple classroom exercises and homework assignments. *Id.* at 1081-82. At the beginning of the school year, Ms. Reilly circulated a description of "All About Me" that also invited parents to participate. *Id.* at 1084-85. The invitation stated:

> All About Me
>
> Each child will have the opportunity to share information about themselves during their "All About Me" week. To start off your child's All About Me week, please send in a poster with pictures, drawings, or magazine cut outs of your child's family, hobbies, or interests. Your child may bring in a special toy or stuffed animal

> during the week to introduce to the class. Your child may also bring in a favorite snack to share with the class during their "All About Me Week." If any parent would like to come to school to share a talent, short game, small craft, or story with us during your child's "All About Me" week please contact me 1 week in advance to schedule a day and time.

Id. at 1137. According to Ms. Reilly, the objectives of "All About Me" were met in her classroom by the students' sharing information about themselves with other students, and discussing their likes and dislikes. *Id.* at 1079.

C. Wesley Busch and His Family

Eric Busch and petitioner Donna Busch are Wesley's parents. C.A. App. 1521-22. For more than nine years, the Busch family has attended Spruce Street Baptist Church in Newtown Square, Pennsylvania. *Id.* at 1042. The Busch family routinely reads the Bible together at breakfast and before going to bed, *id.* at 1231, 1537-38, and Mrs. Busch regularly reads the Bible to her two younger boys in the morning before school, *id.* at 1537-38. Wesley also frequently asks his parents to read the Bible to him. *Ibid.* According to Wesley, the time he shares with his mother reading the Bible is special to him. *Id.* at 1639. At the time of the incident giving rise to this lawsuit, Wesley considered the Bible his favorite book. *Ibid.*

D. Preparations for Wesley's "All About Me" Week

As Wesley's "All About Me" week approached, Mrs. Busch met with Ms. Reilly to inform her that, per Ms. Reilly's invitation, Mrs. Busch wished to participate

in Wesley's week, and she sought ideas for her participation. C.A. App. 1182-83, 1197. Ms. Reilly offered Mrs. Busch several suggestions, such as reading Wesley's favorite book, preparing a dessert or snack, or one of the other items identified in the invitation to parents. *Id.* at 1198-99. After her meeting with Ms. Reilly, Mrs. Busch talked to Wesley about her coming to his classroom, and she asked him what story he would like her to read. *Id.* at 1167. Wesley told his mother that he wanted her to read from the Bible. *Ibid.* The night before her visit, Mrs. Busch decided to read the Old Testament's Psalm 118, verses 1 through 4, and verse 14. *Id.* at 1247, 1252. Those verses state:

> 1 Give thanks unto the Lord, for he is good; because his mercy endures forever.
>
> 2 Let Israel now say, his mercy endures forever.
>
> 3 Let the house of Aaron now say, that his mercy endures forever.
>
> 4 Let them now fear the Lord say, that his mercy endures forever.
>
> * * *
>
> 14 The Lord is my strength and my song, and is become my salvation.

Psalms 118:1-4, 14 (King James).

Three principal considerations led Mrs. Busch to choose verses from Psalms. C.A. App. 1248, 1250. First, she and Wesley frequently read from Psalms, and she knew Wesley liked Psalms. *Id.* at 1249. Second, she thought the children in Wesley's class would enjoy Psalms because they are similar to poetry and songs. *Id.* at 1249, 1375. Third, she

wanted to avoid references to Jesus Christ, which she believed might spark concerns. *Id.* at 1248-50.

Mrs. Busch intended to introduce herself to the students and explain that she was there for Wesley's "All About Me" week, and that Wesley had asked her to read from the Bible, his favorite book. C.A. App. 1478. Mrs. Busch intended only to read five verses from Psalm 118, and not to teach or talk about what they mean. *Id.* at 1376. If asked questions about them, Mrs. Busch intended to tell the students that Psalms are ancient poetry and something Wesley enjoys. *Id.* at 1252-53. Mrs. Busch did not plan to spend more than fifteen minutes in front of Wesley's class. *Ibid.*

E. The School District's Refusal to Permit Mrs. Busch to Read the Selected Verses

When Mrs. Busch arrived at Wesley's class, she advised Ms. Reilly that she intended to read excerpts from Psalm 118. C.A. App. 1254. Unsure of whether to allow Mrs. Busch to read from the Bible, Ms. Reilly contacted Principal Thomas Cook. *Id.* at 1102, 1268. When Principal Cook arrived, he told Mrs. Busch that she should know better than to try to read the Bible in school and that it was against the law. *Id.* at 1276-78, 1286. Principal Cook told Mrs. Busch that "reading the Bible to a kindergarten class violated the doctrine of [separation] of church and state." *Ibid.*; *see also id.* at 1024. He further stated that it was improper to read from the Bible to a class of kindergarten students because, in his view, the "Bible is holy scripture * * * * [I]t's the word of God. And * * * reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view." *Id.* at 1024-25. When Mrs. Busch informed Principal Cook that her

other son had obtained a book from the school library entitled *Gershon's Monster: A Story for the Jewish New Year*, Principal Cook responded that that book was "cultural" and continued to forbid her from reading her desired selection. *Id.* at 1277.[1] Principal Cook did not afford Mrs. Busch the opportunity to explain which verses from Psalm 118 she intended to read, or why she intended to read them. *Id.* at 1290. At Principal Cook's direction, Mrs. Busch chose a different book to read to Wesley's class. *Ibid.*; *see also id.* at 1024.

F. The District Court Decision

Ms. Busch then brought suit against respondents in the United States District Court for the Eastern District of Pennsylvania, contending, *inter alia*, that Marple Newtown had restricted speech in a manner that violated the Free Speech Clause of the First Amendment.[2] Following cross-motions for summary judgment, the district court granted summary judgment in favor of Marple Newtown. Noting that the case raises "very perplexing questions of Constitutional law," Pet. App. 55a, the district court first held that the school, at most, constituted a limited public forum, *id.* at 58a, and that, within this forum, the

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[1] In her classroom, Ms. Reilly kept a small library of books that she periodically read to her class, including several about the Jewish holidays such as *Hooray for Hanukkah* and *The Magic Dreidels*. C.A. App. 1090-92. Additionally, twice during Wesley's school year, another parent gave presentations to the kindergarten class about Hanukkah and Passover; during both, the parent read a book about the respective holiday to the class. *Ibid.*

[2] Mrs. Busch also alleged violations of the Establishment and Due Process Clauses and of the Pennsylvania Constitution. Those allegations are not at issue here.

school's conduct toward Mrs. Busch "constituted viewpoint discrimination." *Id.* at 60a; *see ibid.* ("Clearly, the school did not preclude all speech that dealt in any way with religion but precluded speech in this situation because it expressed a religious viewpoint.").

The district court then observed that the "circumstances under which viewpoint discrimination is permitted is a matter of disagreement among the Circuit Courts." *Id.* at 61a. Concluding that Mrs. Busch's speech constituted "school-endorsed" speech, the district court sided with those circuits that have interpreted *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), to hold that "where there is a likelihood of a perception of school-endorsed speech," schools "may restrict speech even based on its viewpoint 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" Pet. App. 62a (quoting *Hazelwood*, 484 U.S. at 272-73). The district court drew support from the Third Circuit's decision in *Walz* v. *Egg Harbor Township Board of Education*, 342 F.3d 271 (2003), which the district court read "as permitting viewpoint discrimination in limited circumstances when there is a valid educational purpose." Pet. App. 68a. The school's actions were permissible, the court concluded, because it had been seeking to avoid an Establishment Clause violation, which constitutes a "legitimate interest that justifies viewpoint discrimination," *id.* at 69a, and because the "All About Me" exercise was designed to "help students learn about one another," not call for the expression of "specific religious views," *id.* at 70a.

G. The Third Circuit Decision

A divided panel of the court of appeals affirmed. Relying heavily on *Walz* and citing *Hazelwood*, the

court observed that "[r]estrictions on speech during a school's organized, curricular activities are within the school's legitimate area of control"; accordingly, "[c]onsistent with its [*sic*] pedagogical goals, educators may appropriately restrict forms of expression in elementary school classrooms." Pet. App. 14a. With respect to invited speech, schools "may properly require that the solicited speech respond to the subject matter at hand," including "when parents participate in an elementary school's curricular activities." *Id.* at 15a (citing *C.H. ex rel. Z.H.* v. *Oliva*, 226 F.3d 198, 211 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("[I]f a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead.")).

The court of appeals then rejected Mrs. Busch's contention that her speech should have been permitted because she "intended to express a solicited view on the pertinent subject matter"—namely, her son Wesley and his favorite things. The court held that prohibiting Mrs. Busch from reading Psalm 118 was permissible because the school "believed it proselytized a specific religious point of view," and, "as in *Walz*, the school's reasons—to prevent promotion of a religious message in kindergarten—were 'designed to prevent * * * speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval.'" *Id.* at 18a (quoting *Walz*, 343 F.3d at 280). The court concluded that "elementary school administrators and teachers should be given the latitude within a range of reasonableness related to preserving the

school's educational goals," and that the school's actions "were not unreasonable." *Id.* at 20a.[3]

Judge Hardiman dissented. He first criticized the majority's failure to distinguish between content and viewpoint discrimination. Reviewing Supreme Court precedent, Judge Hardiman noted that "viewpoint discrimination occurs when the government targets not just subject matter, but also particular views taken by speakers on a subject." *Id.* at 26a. He also observed that the Supreme Court has "consistently held that discrimination based on the religious character of speech is properly classified as viewpoint discrimination." *Ibid.* Echoing the district court, Judge Hardiman stated that "this case involves viewpoint discrimination," inasmuch as Mrs. Busch's "attempt to read Psalm 118 to her son's class fell within the specified subject matter—*i.e.*, something of interest to her son and important to his family—and the sole reason for excluding her speech was its religious character." *Id.* at 29a.

Second, Judge Hardiman argued that the majority's reliance on *Walz*, which in turn relied on *Hazelwood*, was misplaced. *Hazelwood* "is limited to situations in which the speech may be interpreted as coming from the school itself," and Judge Hardiman found "no risk that Busch's speech would 'bear the imprimatur of the school.'" *Id.* at 34a (quoting *Hazelwood*, 484 U.S. at 271). Judge Hardiman observed that "[e]verything from the title of ["All About Me"]—to the specific requests made by the teacher,

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[3] Judge Barry concurred, observing that she found "something unsettling about this case and others like it" but nevertheless joined the majority opinion because it "correctly applie[d]" Third Circuit precedent. Pet. App. 24a (Barry, J., concurring).

indicated that the student (or, in reality, the parent) was speaking and not the school." *Id.* at 34a-35a.

Finally, Judge Hardiman concluded that even accepting the majority's view that Mrs. Busch's speech constituted "school-endorsed" speech under *Hazelwood*, the school's conduct was not justified. "In holding that a school may regulate school-sponsored expressive activities so long as the regulation is 'reasonably related to legitimate pedagogical concerns,'" according to Judge Hardiman, *Hazelwood* permits discrimination "on the basis of *content*," and does not "offer any justification for allowing educators to discriminate based on *viewpoint* absent a compelling government interest." *Id.* at 37a. He noted that "the question of whether school-sponsored speech can discriminate on the basis of viewpoint remains open" and the "courts of appeal are split on this issue." *Id.* at 38a. Rejecting the majority's position, Judge Hardiman concluded that while "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," it "does not follow * * * that the state may regulate one's viewpoint merely because speech occurs in a schoolhouse." *Id.* at 40a.

REASONS FOR GRANTING THE PETITION

A divided Third Circuit panel held in this case that a public school may engage in viewpoint-related discrimination so long as the school's justification falls within a "range of reasonableness related to preserving the school's educational goals." Pet. App. 20a. In so holding, the court of appeals endorsed a construction of this Court's decision in *Hazelwood* that, as both the district court and dissent observed, has divided the circuits. Three circuits, including the

Third Circuit, have read *Hazelwood* to permit public schools to restrict school-sponsored speech on the basis of viewpoint so long as the restrictions are reasonably related to legitimate pedagogical concerns. Three other circuits, however, have rejected this interpretation and the proposition that *Hazelwood* created an exception to this Court's longstanding instruction that viewpoint-based speech restrictions, even in the school setting, may only be justified by a compelling government interest. The Third Circuit's decision, moreover, is flawed, for this Court has never sanctioned the use of viewpoint-based speech restrictions absent anything less than a compelling government interest. The malleable standards of "reasonableness" and "pedagogical concerns" that the Third Circuit adopted depart from well-established precedent. This case therefore presents an issue of exceptional importance that warrants the Court's review.

ARGUMENT

A. The Circuits Are Split As To Whether Public Schools May Restrict Speech Based on Viewpoint Absent a Compelling Interest

As both the district court and dissent below observed, the courts of appeals are squarely split over whether a public school may place viewpoint-related restrictions on speech in the absence of a compelling interest. Three circuits, including the Third Circuit, have interpreted this Court's decision in *Hazelwood* to hold that a school may engage in viewpoint discrimination so long as the restrictions are reasonably related to a school's educational goals. Three circuits have held otherwise, concluding that

Hazelwood did not *sub silentio* disrupt longstanding precedent requiring the government to demonstrate a compelling interest before engaging in viewpoint-based restrictions. This Court's review is necessary to resolve these widely divergent positions and clarify the standard that a school must satisfy in order to restrict speech on the basis of viewpoint.

1. Circuits Requiring Viewpoint Neutrality Absent a Compelling Government Interest

Three circuits have found that public schools' restrictions on speech during school-sponsored activities must be viewpoint-neutral absent a compelling government interest. The Eleventh Circuit, for example, has expressly rejected the proposition that *Hazelwood* permits school officials to engage in viewpoint discrimination. *Searcey* v. *Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989). It held instead that "[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*," it does not "offer[] any justification for allowing educators to discriminate based on viewpoint." *Id.* at 1325. Accordingly, while *Hazelwood* "did not discuss viewpoint neutrality," the Eleventh Circuit stated, "[t]here is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views." *Id.* at 1319 n.7. The "prohibition against viewpoint discrimination is firmly embedded in first amendment analysis," the court concluded; thus, it would "continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325. *See also Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir.

2005) ("*Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint.").

Similarly, the Second Circuit has rejected the proposition that "*Hazelwood* permits schools to discriminate on the basis of viewpoint—so long as such discrimination is, itself, reasonably related to a legitimate pedagogical interest." *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d Cir. 2005). Similar to the circumstances here, the plaintiffs in *Peck*, a kindergarten student and his parents, alleged violations of free speech after the student's school censored a poster made for a school assembly in response to an assignment on the environment, which included images of Jesus and the church in addition to environmental images. *Id.* at 620-23. Vacating the district court's grant of summary judgment to the school district, the Second Circuit "decline[d] * * * to depart, without clear direction from the Supreme Court, from what has, to date, remained a core facet of First Amendment protection." *Id.* at 633. Rather, it concluded "that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." *Ibid.* (emphasis added).

The Ninth Circuit, too, has read *Hazelwood* to require viewpoint neutrality absent a compelling government interest. In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District,* 941 F.2d 817 (9th Cir. 1991) (en banc), the court held that a school district's refusal to publish abortion related advertisements in a high school yearbook was "not an effort at viewpoint discrimination," *id.* at 830, and, accordingly, was subject to the more relaxed "reasonableness" standard articulated

in *Hazelwood*, *id.* at 829. In so holding, the court cited prior Supreme Court decisions requiring viewpoint neutrality in nonpublic and limited public forums. *See ibid.* (citing *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). The Ninth Circuit has subsequently confirmed that *Planned Parenthood* "incorporated [a] 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000).[4]

2. Circuits Permitting Viewpoint-Based Restrictions Absent A Compelling Government Interest

In addition to the Third Circuit below, which sanctioned viewpoint discrimination by a public school where the restriction was "within a range of reasonableness related to preserving the school's educational goals," Pet. App. 20a, two other circuits have held that, after *Hazelwood*, a school may place viewpoint-based restrictions on school-sponsored speech provided the regulation relates to pedagogical interests. The Tenth Circuit, in *Fleming* v. *Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002), expressly held that "*Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech." *Id.* at 926. Noting the disagreement among the circuits on the question, *ibid.*, the

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[4] In *Kincaid* v. *Gibson*, 191 F.3d 719 (6th Cir. 1999), a panel of the Sixth Circuit construed *Hazelwood* as allowing "reasonable, non-viewpoint-based restriction[s]." *Id.* at 727. The en banc court, however, granted rehearing and reversed on other grounds. See 236 F.3d 342 (6th Cir. 2001).

court concluded that *Hazelwood* "does not require educators' restrictions on school-sponsored speech to be viewpoint neutral" because, in part, *Hazelwood* "makes no mention that the school's restriction must be neutral with respect to viewpoint," *id.* at 928. Accordingly, it permitted the school to exclude religious symbols from a school memorial display, finding these viewpoint-based restrictions to be "reasonably related to a pedagogical interest." *Id.* at 932-34.

Furthermore, the First Circuit has squarely held that *Hazelwood* "did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward* v. *Hickey*, 996 F.2d 448, 454 (1st Cir. 1993). Like the Third Circuit below, the First Circuit instead observed that "whether a regulation is reasonably related to legitimate pedagogical concerns"—the standard of *Hazelwood*— "will depend on, among other things, the age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of the presentation." *See* Pet. App. 12a ("[T]he appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity." (quoting *Walz*, 342 F.3d at 278)).[5]

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[5] In *C.H. ex rel. Z.H.* v. *Oliva*, 195 F.3d 167 (3d Cir. 1999), a panel of the Third Circuit observed that "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored activities so long as those restrictions are reasonably related to legitimate pedagogical concerns." *Id.* at

3. The Circuit Conflict Calls For Supreme Court Review

As set forth above, the courts of appeals are squarely and evenly divided on the application of *Hazelwood* to viewpoint-based discrimination and the showing a public school must make before restricting speech on the basis of viewpoint. Moreover, courts on both sides of the split—as well as the district court and dissent below—have recognized the disarray and have remarked upon the lack of clarity on this question following *Hazelwood*. *See Peck*, 426 F.3d at 631-32 ("Whether *Hazelwood* represents a departure from the long-held requirement of government neutrality in any and all government restriction of private speech is an issue that has been the subject of much debate among Circuit Courts, which have reached conflicting conclusions." (citation omitted)); *id.* at 632 (noting that the question is "anything but clear"); *Downs*, 228 F.3d at 1010 n.2; *Fleming*, 298 F.3d at 926 ("Our sister circuits have split over whether *Hazelwood* requires that schools' restrictions on school-sponsored speech be viewpoint neutral."); *see also Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005) (stating that "[a] split exists among the Circuits on the question of whether *Hazelwood* requires viewpoint neutrality" but declining to consider the question).[6] This clear, recognized, and balanced split among the circuits warrants this Court's review.

172-73. The en banc court, however, granted rehearing and ultimately resolved the case on procedural grounds without addressing the viewpoint neutrality question. See 226 F.3d 198 (3d Cir. 2000).

[6] Recent academic commentary has also highlighted the divide and the need for greater clarity. *See* Emily Gold Waldman, *Returning To Hazelwood's Core: A New Approach To*

B. The Court of Appeals' Decision Is Erroneous

The Third Circuit erred in holding that Marple Newtown's viewpoint-based restriction of the speech here was permissible because it was "within a range of reasonableness related to preserving the school's educational goals." This Court has never sanctioned viewpoint-based speech restrictions absent anything less than a compelling government interest. *Hazelwood* does not provide to the contrary: Its holding that a school may restrict school-sponsored speech if "reasonably related to legitimate pedagogical concerns" arose only in the acknowledged context of restrictions based on content, not viewpoint. The Third Circuit's endorsement of viewpoint-based speech restrictions that are "not unreasonable" is not supported by *Hazelwood* or any other decision of this Court. Its departure from well-established First Amendment principles calls for this Court's review.

1. This Court's Precedent Does Not Permit Viewpoint-Based Discrimination Absent a Compelling Governmental Interest

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I. As this Court has

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Restrictions On School-Sponsored Speech, 60 Fla. L. Rev. 63, 64 (2008) ("[A] sharp split has developed over whether *Hazelwood* goes so far as to permit viewpoint-based speech restrictions, which are generally prohibited under the First Amendment."); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. U. L.J. 175, 191 (2007) ("The courts are deeply divided on how to crucially interpret *Hazelwood*.").

repeatedly noted, the government's ability to restrict speech typically varies depending on the particular forum involved. *See Cornelius*, 473 U.S. at 806; *Peck*, 426 F.3d at 625-26. Even in non-public forums, however, in which the government is afforded the greatest latitude in regulating speech, the Court has consistently held that speech restrictions must remain viewpoint-neutral. *See Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) ("[W]hen the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (quoting *Cornelius*, 473 U.S. at 806) (citing *Perry*, 460 U.S. at 46))); *cf. Tinker* v. *Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969) (prohibiting the "expression of one particular opinion" by students without evidence of potential disruption).

The reason for such vigilance is clear: viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Perry*, 460 U.S. at 62 (Brennan, J., dissenting) (remarking that "viewpoint discrimination is censorship in its purest form"). Accordingly, while "a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum * * * or if he is not a member of the class of speakers for whose especial benefit the forum was

created," the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Furthermore, "[t]he Supreme Court has made it clear that discrimination based on the religious character of speech is viewpoint discrimination." *C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting); *see also Lamb's Chapel*, 508 U.S. at 393 ("[I]t discriminates on the basis of *viewpoint* to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" (emphasis added)); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-30 (1995) (holding that university guidelines prohibiting religious student publication from benefiting from student activities fund constituted unconstitutional viewpoint discrimination). Accordingly, speech restrictions based on religion constitute viewpoint discrimination, permissible at most only if the government can demonstrate a compelling interest in imposing such restrictions. *See, e.g.*, *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112-13 (2001); *Lamb's Chapel*, 508 U.S. at 395; *cf. Morse* v. *Frederick*, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting) (remarking that "censorship that depends on the viewpoint of the speaker * * * is subject to the most rigorous burden of justification"); *see also C.H.*, 226 F.3d at 211 (Alito, J., dissenting) ("It follows that public school authorities may not discriminate against student speech based on its religious content if the discrimination cannot pass strict scrutiny.").

2. *Hazelwood* Did Not Establish an Exception Permitting Viewpoint-Based Discrimination In a School Setting

Contrary to the view of the Third Circuit, the Court's decision in *Hazelwood* did not depart from the long line of authority holding that viewpoint-based speech restrictions are impermissible absent a compelling government interest. In *Hazelwood*, the Court upheld a principal's deletion of articles on teen pregnancy and divorce from a school-sponsored newspaper. It concluded that school-sponsored speech, that is, expression that others "might reasonably perceive to bear the imprimatur of the school," *id.* at 271, may be regulated by a school so long as its "actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Three features of *Hazelwood*, however, reveal that the standard it articulated applies only to content-based regulation, and not viewpoint-based discrimination.

First, the facts of *Hazelwood* did not offer the Court occasion to disturb well-established precedent concerning viewpoint-based discrimination. The school in *Hazelwood* conceded that any restrictions on the newspaper had to be viewpoint-neutral. *See id.* at 287 n.3 (Brennan, J., dissenting). Indeed, the articles at issue were removed because of their subject matter; there was no indication that the principal was motivated by disagreement with the views expressed in the articles, which themselves did not take a position on the subjects but merely described students' experiences. *See id.* at 263.

Second, the Court itself expressly held that "educators do not offend the First Amendment by exercising editorial control over the *style* and *content* of" school-sponsored speech "so long as their actions are rea-

sonably related to legitimate pedagogical concerns." *Id.* at 273 (emphases added). The Court's choice of words reflects an understanding that content-based restrictions are permissible in circumstances falling short of a compelling government interest. The Court did not suggest, however, that this standard applies to viewpoint-based restrictions, long the most "egregious" form of government censorship, *Rosenberger*, 515 U.S. at 829.

Third, the precedent *Hazelwood* drew upon illustrates an intention to limit its holding to content-based speech restrictions, and not viewpoint-based regulation. In determining the type of forum the school created by establishing and offering a student newspaper, the Court relied considerably on its prior decisions in *Cornelius* and *Perry*. *See* 484 U.S. at 267-70. Both decisions squarely hold that the First Amendment precludes the government from engaging in viewpoint-based discrimination. *See Cornelius*, 473 U.S. at 811; *Perry*, 460 U.S. at 46. Yet *Hazelwood* never distinguished these cases in announcing a lower standard. It would be odd to suggest that the Court extensively cited *Cornelius* and *Perry*, which plainly and unconditionally prohibit viewpoint discrimination, but then overruled them in part. This is especially unlikely in view of *Hazelwood*'s reference to "style and content," rather than viewpoint.

3. The Third Circuit Erroneously Endorsed a View of *Hazelwood* Permitting Viewpoint-Based Discrimination Absent a Compelling Interest

The Third Circuit's decision below erred in endorsing a view of *Hazelwood* that permits schools to engage in viewpoint-based discrimination of speech so long as the restriction is "within a range of reasonableness related to preserving the school's educational goals." Pet. App. 20a. Citing *Hazelwood* and *Walz*, a circuit precedent relying on *Hazelwood*, the court held that "*specific religious messages*" could, "consistent with * * * pedagogical goals," be "appropriately restrict[ed]." *Id.* at 14a; *see also id.* at 15a (schools may prohibit "specific messages"). It then applied a "reasonableness" standard to evaluate the viewpoint-based responses of the school to Mrs. Busch's planned speech, concluding that they were "not unreasonable."[7] This reasoning has no support in *Hazelwood* or in any precedent of the Court, all of which require a compelling interest in order to justify a viewpoint-based restriction on speech.

Moreover, the Court's application of a "reasonableness" standard to the facts of the case directly contravenes the instruction of this Court. Mrs. Busch argued below that "once she was invited to speak,

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[7] There is no dispute in this case that Marple Newtown's response to Mrs. Busch's attempted speech constituted viewpoint discrimination. The district court so found, *see* Pet. App. 60a, and Marple Newtown did not challenge that finding on appeal, *see id.* at 30a (Hardiman, J., dissenting) ("Donna Busch was denied the opportunity to read the story her son chose because it expressed a *religious viewpoint*, rather than a secular one. This plainly constituted viewpoint, not subject matter, discrimination.").

any restriction on her speech was impermissible so long as her speech was about Wesley." Pet. App. 17a. *Cornelius* counsels that the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 473 U.S. at 806 (emphasis added). The Third Circuit, however, upheld the school's actions because the principal believed Mrs. Busch's speech—regardless of whether it fell within the purview of the "otherwise includible subject" of her son and his favorite things—constituted "a specific religious point of view." Pet. App. 18a. Permitting such a "point of view," the court held, would "be at cross-purposes with [the school's] educational goals," and thus the school could forbid it. But such a position is squarely "at cross-purposes with" *Cornelius*, demonstrating the Third Circuit's misreading of this Court's precedent.

Finally, the Third Circuit's decision, like those of other circuits that have adopted a relaxed standard for assessing viewpoint-based restrictions, is not only unfounded but unwise. The decision leaves neither public school administrators nor students, parents, or any other party with any clear guidance as to when a school may or may not suppress a particular viewpoint in the context of school-sponsored activity. Contrary to the more rigorous "compelling interest" standard, "reasonableness" and "pedagogical objectives" are malleable concepts that schools could use to justify any view-point-based restriction. *Cf. Morse*, 551 U.S. at 409 ("[M]uch political and religious speech might be perceived as offensive to some."); *id.* at 423 (Alito, J., concurring) (deeming an argument that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission'" as one that "can

easily be manipulated in dangerous ways"). Indeed, in this case, *allowing* Mrs. Busch's participation would have met the pedagogical objective of the assignment, which was to recognize individual student interests and identify sources of conflict and their resolution. Moreover, as Judge Hardiman stated in dissent, "[i]f schools could impose viewpoint-based restrictions on all student speech that might be perceived as school-sponsored, the promise of *Tinker*—that students 'do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'—would mean very little." Pet. App. 38a (Hardiman, J., dissenting) (quoting 393 U.S. at 506). This Court's intervention is therefore necessary to correct the incorrect and imprudent decision of the Third Circuit below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

AMENDED PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 07-2967

DONNA KAY BUSCH, IN HER INDIVIDUAL CAPACITY AND AS THE PARENT AND NEXT FRIEND OF WESLEY BUSCH, A MINOR

v.

MARPLE NEWTOWN SCHOOL DISTRICT; MARPLE NEWTOWN SCHOOL DISTRICT BOARD OF DIRECTORS; ROBERT MESAROS, SUPERINTENDENT OF THE MARPLE NEWTOWN SCHOOL DISTRICT; THOMAS COOK, PRINCIPAL OF CULBERTSON ELEMENTARY SCHOOL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 05-cv-02094
(District Judge: Honorable R. Barclay Surrick)

Argued May 5, 2008
Before: SCIRICA, *Chief Judge,*
BARRY and HARDIMAN, *Circuit Judges.*

(Filed: June 1, 2009)

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OPINION OF THE COURT

SCIRICA, *Chief Judge.*

Plaintiffs, who are mother and son, bring free speech, establishment, and equal protection claims against Defendants, who are school officials and the school district. These claims stem from an elementary school's restriction of the mother's effort to read aloud from scripture to students in her son's kindergarten classroom as part of a curricular "show and tell"- type activity. The District Court granted summary judgment in favor of Defendants on all claims. We will affirm.

I

Donna Kay Busch[1] is the mother of Wesley Busch, a kindergarten student at Culbertson Elementary School of the Marple Newtown School District, who was age five at the time this matter arose. Busch describes herself as an Evangelical Christian,[2] and Wesley shares his mother's religious beliefs. Busch and Wesley routinely read the Bible together at breakfast and before going to bed, and Wesley often carries the Bible with him.

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[1] Because Donna Kay Busch brings claims on Wesley's behalf, we will refer to her as the central litigant.

[2] Busch testified that an Evangelical Christian is "someone who believes . . . the Bible is the literal word of God." Her husband described an Evangelical as "one who brings God's word to the world."

In October 2004, as a student in teacher Jaime Reilly's kindergarten class, Wesley participated in a curricular unit called "All About Me." The unit was part of the social studies curriculum and was designed to be a "socialization" program in which students would "identify individual interests and learn about others" and would "identify sources of conflict with others and ways that conflicts can be resolved."

Each student in Reilly's class was featured during his or her own "All About Me" week, and during the designated week, the curriculum called for the student's participation in three ways. First, each student was given the opportunity to "share information about themselves [sic]" by bringing in "a poster with pictures, drawings or magazine cut outs of [his or her] family, hobbies or interests." Second, the student was also permitted to bring a snack to share as well as a special toy or stuffed animal to introduce to the class. Third, Reilly invited parents to participate in the unit by visiting the school to "share a talent, short game, small craft, or story" with the class during their child's designated week.

As one aspect of Wesley's participation in his "All About Me" week, he made a poster with his mother that included photographs of himself with his hamster, his brothers, his parents, his best friend at the time, and a picture of a church cut out from construction paper. Busch testified that she wrote what Wesley asked her to write under the picture of the church: "I love to go to the House of the Lord" or "I like to go to church" or "something like that." The poster was displayed in Wesley's classroom. And Wesley, like other students, had the opportunity to present his poster to the class and talk about the various items on it.

On October 15, 2004, Busch was scheduled to visit Wesley's class to participate in his "All About Me" week. She told Wesley that Reilly invited her to visit class and read his favorite book. When she asked him what he would like her to read, Wesley responded, "the Bible."[3]

The night before her visit to Wesley's class, Busch, alone, without Wesley, pondered what passage she would read from the Bible. Eventually she selected verses 1 through 4 and verse 14 of Psalm 118 from the King James Bible:

> 1. Give thanks unto the Lord, for he is good; because his mercy endures forever.
>
> 2. Let Israel now say, his mercy endures forever.
>
> 3. Let the house of Aaron now say, that his mercy endures forever.
>
> 4 Let them now that fear the Lord say, that his mercy endures forever.
>
> * * *
>
> 14. The Lord is my strength and my song, and is become my salvation.

Busch testified she chose these verses because (1) she and Wesley frequently read from the Book of Psalms; (2) she thought the children would like Psalms because they are similar to poetry; and (3) she desired a reading that did not make reference to Jesus, which she worried might upset some people given what she perceived in the past as hostility in

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[3] Wesley's babysitter, Judy Harper, testified that Wesley's favorite book in kindergarten was *Brown Bear, Brown Bear*. Nevertheless, on summary judgment, we assume that Wesley's favorite book was the Bible and that the Bible was chosen according to his preference.

the school district towards her Christian beliefs. She also testified that she intended to read the verses to the students without explanation and that, if asked questions about the reading, she would respond that "it was ancient psalms and ancient poetry and one of Wesley's favorite things to hear."

On the morning she was supposed to read to Wesley's class, Busch informed Reilly of her decision to read from the Bible. Reilly said she would have to check with the school's principal, Thomas Cook, who then arrived and spoke to Busch in the hallway. He told Busch reading the Bible to the class would be "against the law . . . of separation of church and state" and asked her to read from another book. Principal Cook testified he determined it was improper to read from the Bible to a class of kindergarten students because he believed "the Bible is holy scripture . . . [I]t's the word of God. And . . . reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view."[4] Busch testified that she remembered Cook using the word "proselytizing" and that she understood him to be saying it was against the law for her to try to "convert souls."

Busch objected, telling Cook that her other son, age six, had just finished reading a book called *Gershon's Monster: A Story for the Jewish New Year,* which he had obtained from the school library. Cook responded: "Well, that's cultural and your son chose

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[4] Robert Mesaros, Superintendent of the Marple Newtown School District, later supported Principal Cook's response to Busch based on the captive nature of the classroom audience, the parent appearing to "tak[e] the place of the teacher" in the classroom, and the likely perception that the school district was advocating or supporting whatever was going to be read.

that book and these children are not choosing to hear from the Bible . . . . I can't let you do it." Reilly offered Busch another book to read, and they settled on a book about counting. Reilly testified the hallway conversation was inaudible in the classroom, she never spoke with Wesley or the other children about the incident, and she did not notice any change in Wesley's behavior or demeanor that day.

Other parents also participated in their children's "All About Me" weeks by reading stories to the class, sharing snacks, and doing crafts. Among the stories read by parents were: *The Grinch Who Stole Christmas, The Jolly Roger,* and *Green Eggs and Ham.* Reilly also keeps a library of books from which she periodically reads to Wesley's class. Among those books are several about holidays, including: *Bear Stays Up for Christmas, Froggy's Best Christmas, The Wild Christmas Reindeer, Ten Timid Ghosts on a Christmas Night, Christmas Trolls, The Best Easter Eggs Ever, Easter Bunny's On His Way, The Night Before Easter, Hooray for Hanukkah, The Magic Dreidels,* and *The Hanukkah Mice.*

Additionally, one parent, Linda Lipski, visited Reilly's class twice during the year to give presentations on Hanukkah and Passover that were planned in advance with Reilly. During Hanukkah, Lipski brought in a menorah and a dreidel and read "a Blue's Clues Hanukkah story." Later in the year, during the Passover holiday, Lipski "read *The Matzoh Ball Fairy* to the students and then offered them matzoh ball with chicken soup."[5] Reilly set up

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[5] Reilly testified *The Matzoh Ball Fairy* is about a "family [that] eats matzoh balls[,] and they float because the matzoh balls were light and fluffy."

Lipski's presentation by discussing Easter and Passover. She also discussed Christmas and Kwanzaa as part of the winter holiday unit in the social studies curriculum, and recalled a picture of a Christmas tree hanging in the classroom at the time of the Hanukkah presentation. Reilly explained she was comfortable permitting the holiday materials and presentations because (1) the holidays were part of the official social studies curriculum, (2) the menorah and dreidel were symbols used on activity sheets in that curriculum, and (3) they appeared consistent with the Marple Newtown School District's policy on holiday observances.

On May 3, 2005, Busch filed this lawsuit on behalf of herself and Wesley against the Marple Newtown School District, the Marple Newtown School District Board, School District Superintendent Robert Mesaros, and School Principal Thomas Cook, asserting six claims: (1) violation of the Free Speech Clause of the United States Constitution; (2) violation of the Free Communication Clause of the Pennsylvania Constitution; (3) violation of the Establishment Clause of the United States Constitution; (4) violation of the Establishment Clause of the Pennsylvania Constitution; (5) violation of the Equal Protection Clause of the United States Constitution; and (6) violation of the guarantee of equal rights and the prohibition on discrimination in the Pennsylvania Constitution.[6]

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[6] Regarding the state speech claims, the Pennsylvania Supreme Court has identified several factors to guide an analysis of whether differences exist between federal and state constitutional provisions. *Pap's A.M. v. City of Erie,* 812 A.2d 591, 603 (Pa. 2002) *(citing Commonwealth v. Edmunds,* 586 A.2d 887, 895 (Pa. 1991)). Plaintiff has not addressed any of these factors, and our own consideration of them does not indicate the Pennsylvania Constitution differs from the federal constitution in the

Busch seeks a declaratory judgment, actual and nominal damages, and costs and fees.

Following cross motions for summary judgment, the District Court granted summary judgment in favor of the Defendants and against Busch on all claims. This appeal followed.[7]

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area of school speech. To the contrary, Pennsylvania state courts have followed federal constitutional principles when considering the speech of teachers in Pennsylvania classrooms, *see Fink v. Bd. of Educ. of Warren County Sch. Dist.*, 442 A.2d 837, 839-40, 841-42 (Pa. Commw. Ct. 1982) (holding the school did not violate the teacher's constitutional rights by prohibiting the teacher from reading the Bible in class), and as a matter of state policy—relevant to the Pennsylvania constitutional analysis—the Pennsylvania legislature has expressed a preference that religious texts not be introduced to younger students. 24 Pa. Stat. Ann. § 15-1515 (West 2006). Accordingly, we believe the analysis of Busch's free speech claims under the United States Constitution is dispositive of her claims under the Free Communications Clause, Article I, § 7, of the Pennsylvania Constitution.

Busch's state establishment and equal protection claims are likewise disposed of by the relevant provisions of the federal constitution. *Springfield Sch. Dist. v. Dep't of Educ.*, 397 A.2d 1154, 1170 (Pa. 1979) ("[T]he provisions of Article I, Section 3 of [the Pennsylvania] constitution do not exceed the limitations in the first amendment's establishment clause."); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003) ("[T]he meaning and purpose of the Equal Protection Clause of the United States Constitution and the state Constitution's prohibition against special laws are sufficiently similar to warrant like treatment, and. . . contentions concerning the two provisions may be reviewed simultaneously." (citations omitted)).

[7] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291 to review the District Court's grant of summary judgment. Our review is plenary, and we apply the same standard as the District Court. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d

II

A

The elementary school setting—and particularly the kindergarten classroom—is a unique forum for purposes of considering competing First Amendment and pedagogical interests. Unlike parks, streets, and other traditional public fora, elementary school classrooms are not places for unlimited debate on issues of public importance. *See Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260,267 (1988). Most of the time, school classrooms are reserved for teaching students in a structured environment. *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.,* 342 F.3d 271, 275-76 (3d Cir. 2003). Public schools may take on characteristics of public fora by "intentionally opening" facilities for "public discourse." *Hazelwood Sch. Dist.,* 484 U.S. at 267 *(quoting Cornelius v. NAACP Legal Def and Educ. Fund, Inc.,* 473 U.S. 788, 802 (1985)); *id.* ("[S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." *(quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 47 (1983), *and citing Perry Educ. Ass'n,* 460 U.S. at 46 n.7)); *see also Good News Club v. Milford Cent.*

1224, 1230 (3d Cir. 1993). Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [school district] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party:" in this case, the plaintiffs. *Combs v. Homer-Ctr. Sch. Dist.,* 540 F.3d 231, 235 n.5 (3d Cir. 2008) (citation omitted).

Sch., 533 U.S. 98, 102, 106-07 (2001) (opening school facilities to community groups after school hours); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524-26 (3d Cir. 2004) (opening school facilities to a "broad array of community groups"). But in classrooms, during school hours, when curricular activities are supervised by teachers, the nonpublic nature of the school is preserved. Speech occurring during these activities may be regulated under standards different from those that would apply in public fora.

In the elementary school classroom, "the appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity." *Walz*, 342 F.3d at 278; *see also id.* at 275 ("In the elementary school setting, age and context are key."). As we have explained, "the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise."[8] *Id.* at 276. "While secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis, kindergartners and first graders are different." *Id.* at 277 (internal quotation

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[8] "[A]ny analysis of the students' rights to expression on the one hand, and of schools' need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student." *Walker-Serrano by Walker v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003).

marks and citation omitted). For elementary school students, "the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-based goals." *Id.*

Restrictions on speech during a school's organized, curricular activities are within the school's legitimate area of control because they help create the structured environment in which the school imparts basic social, behavioral, and academic lessons. *Id.* at 275-76. The curricular standards applied during these activities, "especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned." *Id.* at 277; *see also Hazelwood Sch. Dist.*, 484 U.S. at 271 ("Educators are entitled to exercise greater control over [school-sponsored expressive activities] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.").

Some classroom discussion of religion or religious practices may be consistent with appropriate curricular standards, but classroom speech promoting religion or specific religious messages presents special problems for educators. *See Walz*, 342 F.3d at 280 ("[P]roselytizing speech . . . if permitted, would be at cross-purposes with [the school's] educational goal and could appear to bear the school's seal of approval."); *id.* at 278 ("For a student in 'show and tell' to pass around a Christmas ornament or a drei-

del, and describe what the item means to him, may well be consistent with the activity's educational goals . . . . Nevertheless, in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message."); *cf Edwards v. Aguillard,* 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary."). Consistent with its pedagogical goals, educators may appropriately restrict forms of expression in elementary school classrooms.

Whether a school invites or solicits speech from students helps determine whether student speech is consistent with the school's pedagogical goals. But the fact the speech was invited during a curricular activity does not necessarily prevent the school from limiting the student's response. The school may properly require that the solicited speech respond to the subject matter at hand. *See C.H. ex rel. Z.H. v. Oliva,* 226 F.3d 198, 211 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("Public school teachers have the authority to specify the subjects that students may discuss in class and the subjects of assignments that students are asked to complete. Thus, if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead." (citations omitted)). And the school may require classroom responses conform to the mode of presentation requested. *Walz,* 342 F.3d at 279. That is, when invitations for student expres-

sion are intended to elicit descriptive responses, the school may limit the responses accordingly.

Likewise, when parents participate in an elementary school's curricular activities, the school may impose the same requirement—that they refrain from promoting specific messages in class. The school's pedagogical considerations are present, and are perhaps heightened, when a parent is the speaker because parents, much like teachers, are typically held in high regard and viewed as authoritative by young children. By inviting participation in curricular activities, educators do not cede control over the message and content of the subject matter presented in the classroom. Were teachers or school administrators required to do so, individual students or parents could use the classroom to promote any message in the guise of a pedagogically approved curricular activity.

Educators should be free to seek appropriate ways to involve parents in the education of their children. *See* Brief of Nat'l Sch. Bds. Ass'n and Pa. Sch. Bds. Ass'n as Amici Curiae Supporting Appellees at 4 (recognizing "the need to avoid creating legal disincentives for schools to do all they can to engage parents in their children's educations"). Yet the value and frequency of these efforts could be jeopardized if parents—once invited into the classroom to share details about their family experience as part of "show and tell" activities—could express any message of their choosing so long as it related in some way to their child. *See id.* (explaining that inability to exercise discretion would "force school districts to re-evaluate parent participation in school projects on the basis that they can ill afford the loss of control over the curriculum, legal complications, and poten-

tial liabilities"); *id.* at 10 *("Amici* submit that activities which take place during instructional time in public schools must be subject to school control, and that the mere invitation to parents to help out with classroom activities or homework assignments cannot result in carte blanche to teach anything one pleases to a captive audience of public school students."). In the elementary school setting, and particularly at the kindergarten level, educators would face the dilemma of either foregoing valuable curricular activities or foregoing the ability to control the pedagogical direction of their classrooms.

B

In this case, Donna Busch sought to read aloud passages from the Bible to students in a kindergarten classroom, with the teacher present, as part of a curricular exercise. In this context, the school was concerned she would "promote a religious message through the channel of a benign classroom activity." *Walz,* 342 F.3d at 280.

Busch contends the nature of the "All About Me" exercise alters the context of the speech in two ways. First, she contends the activity's focus on Wesley during his "All About Me" week prevented any perception of school endorsement. "Show and tell" exercises—commonplace in elementary school curricula—are valuable pedagogical tools for furthering the behavioral and social development of children. But like other curricular activities in the kindergarten classroom, "show and tell" assignments generally presume the school may limit the content of the presentations. *Cf. id.* at 278 ("[I]n the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message."). Moreover, unlike in *Walz,* the speaker

here was not a student. That it was a student's parent further blurs "the line between school-endorsed speech and merely allowable speech." *Id.* at 277.

Second, pointing to our statement in *Walz* that "[i]ndividual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected," *id.* at 279, Busch contends her speech should have been permitted because she intended to express a solicited view on the pertinent subject matter. That is, the school invited her to participate in Wesley's "All About Me" week, where "all about Wesley" was the subject matter, and she intended to present a viewpoint about Wesley. Accordingly, Busch contends that once she was invited to speak, any restriction on her speech was impermissible so long as her speech was about Wesley.[9]

The school need not choose, however, between soliciting information about students as part of curricular activities and opening the classroom to any content the speaker chooses to disseminate. In crafting a curriculum, school officials face the sensitive task of exposing children to diverse traditions and cultural expe-

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[9] At her deposition, Busch testified that the school would not be able to restrict a parent in Wesley's class who, as part of his or her child's "All About Me" week, wished to read material advocating extreme violence and discrimination. We think it is fair to discount these statements, which were elicited by opposing counsel's pointed questioning. When presented with less provocative hypothetical scenarios at oral argument on this appeal, however, Busch's attorney similarly asserted that no line drawing by the school would have been permissible so long as a parent's message related to his or her child. The gist of Busch's testimony and counsel's argument is that Busch believes schools must choose between allowing all invited parent speech or allowing none at all.

riences while also remaining mindful of the expectations and rights of the children and their parents. Principal Cook disallowed a reading from holy scripture because he believed it proselytized a specific religious point of view. As in *Walz,* the school's reasons—to prevent promotion of a religious message in kindergarten—were "designed to prevent . . . speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval." *Id.* at 280.

Busch also contends the school's restriction of her speech was unrelated to the legitimate purpose of avoiding promotion of religious messages generally but was instead motivated by its desire to censor her and Wesley's particular religious beliefs. That is, the school was unconcerned with proselytizing generally and only concerned with her Christian messages. She bases her contention on a general assertion that the school had previously exhibited animosity toward her faith while tolerating the presentations of parents of other faiths in Wesley's classroom. Specifically, she points to the two presentations by Linda Lipski on Hanukkah and Passover. As noted, during Hanukkah, Lipski brought in a menorah and a dreidel and read "a Blue's Clues Hanukkah story." On the Passover holiday, Lipski read *The Matzoh Ball Fairy* to the students and then offered them matzoh ball with chicken soup.[10]

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[10] Busch also acknowledged that Wesley's teacher keeps a library of books she periodically reads to Wesley's class. Several of these books are about holidays, including *Bear Stays Up for Christmas, Froggy's Best Christmas, The Wild Christmas Reindeer, Ten Timid Ghosts on a Christmas Night, Christmas Trolls, The Best Easter Eggs Ever, Easter Bunny's On His Way, The*

But the unchallenged record demonstrates the school permitted Wesley, in the classroom and as part of his "All About Me" week, to express his religious beliefs. These beliefs were featured on his "All About Me" poster as a depiction of a church and a statement expressing that he likes to attend church. Wesley was permitted, as other students were, to present his poster to the class in the manner he desired. Accordingly, the school's actions do not appear to have been motivated by discrimination against Wesley's religion. Rather, the school identified a significant difference between the identification of religious belief and certain holiday-oriented religious materials, on the one hand, and a parent's reading of holy scripture, on the other hand, which it considered a form of proselytizing.

It may be reasonably argued that a mother's reading of the Bible to a kindergarten class, especially sublime verses from the Book of Psalms, should be permitted. In this sense and for many, the conduct is benign and the message inspiring. But a reading from the Bible or other religious text is more than a message and unquestionably conveys a strong sense of spiritual and moral authority. In this case, the audience is involuntary and very young. Parents of public school kindergarten students may reasonably expect their children will not become captive audiences to an adult's reading of religious texts.

The dilemma here is that our jurisprudence seeks to affirm the right of individuals to identify and practice their religion and at the same time to forestall the establishment of religion. In this case, as in many

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Night Before Easter, Hooray for Hanukkah, The Magic Dreidels, and *The Hanukkah Mice.*

others, these fundamental principles are in tension with one another. Often a vehicle of religious practice, speech is sometimes undertaken in private, sometimes in a group, and sometimes, as here, in a public school. The public school setting may implicate the Establishment Clause, especially where public authority undertakes or is reasonably perceived to have undertaken to give one religious belief official approval or approval over other religious beliefs. And this tension is particularly vexing in a public school where attendance is compulsory and moral and social values are being developed along with basic learning skills. In seeking to address that tension, elementary school administrators and teachers should be given latitude within a range of reasonableness related to preserving the school's educational goals. *See Hazelwood Sch. Dist.*, 484 U.S. at 273; *Walz*, 342 F.3d at 277-78, 280-81. In this case, the school's actions were not unreasonable.[11]

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[11] Busch averred additional claims on equal protection grounds. She contends the school's disparate treatment of her and Lipski interfered with her and Wesley's fundamental right to free speech. Because we conclude the school's actions did not unconstitutionally burden Busch or Wesley's First Amendment rights, rational basis review is appropriate. *See Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test."); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) ("[R]ational basis review is appropriate unless the restriction unconstitutionally burdens a fundamental right, here, the right to free speech. Because we conclude that the restrictions do not unconstitutionally burden Rubin's right of free speech, we find that neither do they violate his Equal Protection right."). Accor-

III

Busch also challenges the school's actions on establishment grounds. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government conduct complies with the Establishment Clause if it meets three criteria. First, it must have a secular purpose. *Id.* at 612. Second, its primary or principal effect can neither advance nor inhibit religion, meaning that regardless of its purpose, the action cannot symbolically endorse or disapprove of religion. *See id.; ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1485-86 (3d Cir. 1996) (en banc). Third, the government action cannot foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 613; *ACLU*, 84 F.3d at 1483.

Regarding the first of these criteria, Principal Cook prohibited Busch's reading because he said it would be "against the law . . . of separation of church and state." Complying with the Establishment Clause jurisprudence is a secular purpose. And given the history of Establishment Clause violations when religious messages have been conveyed at school-sponsored activities, *see, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation ceremony), Cook's determination that a biblical reading to kindergarten students during a curricular activity might also violate the Establishment Clause is not unreasonable.

The likelihood of an Establishment Clause violation is relevant to the second *Lemon* prong as well. An objective observer would recognize the challenges

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dingly, because the school's action was in furtherance of a legitimate pedagogical objective, we affirm the District Court's holding that no equal protection violation occurred.

educators face when confronting potential Establishment Clause violations. *See, e.g., Santa Fe Indep. Sch. Dist.,* 530 U.S. at 308 (focusing the analysis on an objective observer familiar with the situation confronting the school). Principal Cook's efforts were reasonably oriented toward complying with the Constitution, and accordingly, an observer would not recognize his actions to be hostile toward Wesley and Busch's faith. An objective observer would also know of Wesley's own participation in the "All About Me" week. These events do not demonstrate hostility to Wesley's identification with his faith.

Finally, Busch suggests the school's policy governing religious content in the classroom requires educators to make ad hoc judgments, creating an excessive entanglement with religion: "Defendants do not have a coherent policy governing parental participation in classroom activities or religious expression. Instead, judgments about what is permissible and what is not permissible are made on an *ad hoc* basis, with Defendants scrutinizing the speech at issue and making an uninformed judgment call as to whether the speech is too religious. This creates excessive entanglement between government and religion." Br. of Appellant at 15. The school district, however, has a policy permitting holiday-oriented content and cultural themes but disallowing speech that promotes religion. The school's monitoring of materials presented in elementary classrooms for the purpose of complying with its policy and the Establishment Clause does not render the government's actions excessively entangled with religion. *See Bowen v. Kendrick,* 487 U.S. 589, 615-17 (1988) (finding the review of educational materials to ensure compliance with statutory and constitutional requirements does not create an excessive entanglement with religion).

Accordingly, the school's actions do not violate the Establishment Clause because they were motivated by a permissible purpose to comply with the Establishment Clause; they do not evidence hostility toward Wesley's faith; and they are not excessively entangled with religion.

IV

For the foregoing reasons, we will affirm the judgment of the District Court.

BARRY, Circuit Judge, *concurring.*

We have observed that "at a certain point, a school child is so young that it might reasonably be presumed" that the First Amendment does not protect that child's speech. *Walker-Serrano by Walker v. Leonard,* 325 F.3d 412, 417 (3d Cir. 2003). We have also observed that "[w]here that point falls is subject to reasonable debate." *Id.*

It cannot seriously be a subject of reasonable debate that "that point" is kindergarten. I say this not because Wesley, then age five, could neither read nor write and not because I take issue with his mother's claim that the Bible is Wesley's favorite book and not because, at least in my view, Wesley and his kindergarten classmates would have been unable to understand the excerpts from Psalm 118 that his mother sought to read on his behalf, excerpts which tell us what Israel and the House of Aaron say about the Lord's mercy and note the concept of salvation, a concept I note has been the subject of discussion and debate among biblical scholars for centuries. I say that "that point" is kindergarten because children of kindergarten age are simply too young and the responsibilities of their teachers too special to elevate to a constitutional dispute cognizable in federal court

any disagreement over what a child can and cannot say and can and cannot do and what a classmate can and cannot be subjected to by that child or his or her champion.

We send our littlest ones off to school worrying about them and hoping no harm will come to them, but confident in the knowledge that they will be protected and guided and, yes, nurtured by their teachers, who are our surrogates while our children are away. And so I write because I find something unsettling about this case and others like it which, while recognizing the crucial importance of age in determining the extent of the First Amendment's protections, have not—at least, not yet—carved out an exception for the little ones but, rather, continue to scrutinize and analyze purported violations of the First Amendment rights of children at the pre-K and kindergarten levels. I nonetheless join Chief Judge Scirica's excellent Opinion because it correctly applies our precedent to the issues before us. Perhaps our next case will tweak that precedent just slightly to accommodate my concerns.

HARDIMAN, Circuit Judge, *dissenting in part and concurring in part.*

The Supreme Court has consistently considered two important questions in Free Speech Clause cases involving private speech: (1) whether the state's regulation of speech is based on subject matter or viewpoint; and (2) whether the speech being regulated takes place in a public forum, a limited public forum, or a nonpublic forum. The majority does not discuss the first question. As for the second question, the majority summarily concludes that this classroom was a nonpublic forum. After doing so, the majority relies extensively on *Walz v. Egg Harbor Township*

Board of Education, 342 F.3d 271 (3d Cir. 2003), in concluding that the School District appropriately barred Donna Busch from speaking. Because I do not believe *Walz* controls this appeal, I must respectfully dissent from that portion of the majority's opinion that relates to Busch's free speech claim.[12]

I.

Under the First Amendment, content-based regulations of speech are presumptively invalid. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). This presumption covers two types of content-based regulations: (1) prohibitions of public discussion of an entire topic or subject matter; and (2) restrictions on particular viewpoints. *See Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n,* 447 U.S. 530, 537 (1980). Accordingly, a content-neutral regulation "places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed." *Hill v. Colorado,* 530 U.S. 703, 723 (2000).

The distinction between subject-matter and viewpoint discrimination is not a bright one. *Cogswell v. City of Seattle,* 347 F.3d 809, 815 (9th Cir. 2003). As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley,* 408 U.S. 92, 96 (1972). Therefore, governmental action that regulates speech on the basis of its subject matter "slip[s] from the neutrality of time, place, and cir-

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[12] I concur with the majority's holding in Part III of its opinion denying Busch relief on her Establishment Clause claim. However, I disagree with the majority's implication in that Part that the School District's desire to avoid an Establishment Clause violation was a valid concern. *See infra* note 5.

cumstance into a concern about content." *Id.* at 99. If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating." *Consol. Edison,* 447 U.S. at 537-38; *Startzell v. City of Phila.,* 533 F.3d 183, 192-93 (3d Cir. 2008). "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 515 (1981).

By contrast, viewpoint discrimination occurs when the government targets not just subject matter, but also particular views taken by speakers on a subject. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829 (1995). Viewpoint discrimination is "an egregious form of content discrimination" and "the violation of the First Amendment is all the more blatant." *Id.* "To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint." *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514, 527 (3d Cir. 2004). As Justice Brennan explained in his dissent in *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), "[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Id.* at 62.

The Supreme Court has consistently held that discrimination based on the religious character of speech is properly classified as viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), the Court held that a school district could not permit school property

to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious perspective. *Id.* at 393. Similarly, in *Rosenberger,* the Court held unconstitutional a university's refusal to fund a student publication because it addressed issues from a religious perspective. 515 U.S. at 831. The Court explained: "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* Finally, in *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), the Court found viewpoint discrimination where a public school permitted nonreligious groups to meet on school property after school but prohibited a Christian club from doing so. *Id.* at 107-09. The Court held that exclusion of a religious group amounted to impermissible viewpoint discrimination where the group sought only "to address a subject otherwise permitted under the [school district's policy], the teaching of morals and character, from a religious standpoint." *Id.* at 109. Together, *Lamb's Chapel, Rosenberger,* and *Good News Club* stand for the proposition that if the government permits the discussion of a topic from a secular perspective, "it may not shut out speech that discusses that same topic from a religious perspective." *Stafford,* 386 F.3d at 528.

Comparing the facts of *Walz* and the present case, I find they fall on opposite sides of the subject-matter /viewpoint divide. In *Walz,* this Court considered whether a school's refusal to allow a first-grade student to distribute pencils that included the phrase "Jesus [Loves] The Little Children" and candy canes with attached religious stories during a classroom holiday party violated the student's constitutional

rights. 342 F.3d at 274. The school maintained an unwritten policy forbidding religious, as well as political and commercial messages, but noted that religion may be acknowledged "if presented in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday." *Id.* at 273. As the district court in *Walz* determined, the regulation at issue was viewpoint neutral, although it limited some religious speech. *Walz v. Egg Harbor Twp. Bd. of Educ.*, 187 F. Supp. 2d 232, 239-40 (D.N.J. 2002). Citing *Lamb's Chapel,* the student argued that because the restriction addressed religious speech specifically, it was not viewpoint neutral. The district court disagreed. The court acknowledged the Supreme Court's warning that discrimination against religion in general may constitute viewpoint discrimination because it prevents discussion from a religious standpoint. However, the court found *Lamb's Chapel* and its progeny inapplicable because the school had not opened a forum for the exchange of views about a subject by hosting a holiday party. *Id.* at 239. Rather, the school had only solicited generic gifts devoid of any message and had not created a forum to promote *any* viewpoint, religious *or* secular. *Id.* Therefore, the district court properly concluded that the regulation was viewpoint neutral, even if it discriminated on the basis of subject matter.

In contrast to the district court's careful analysis of the distinction between subject matter and viewpoint discrimination in *Walz,* this Court declined to engage in such an inquiry on appeal, concluding that "in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message." *Walz,* 342 F.3d at 278. Without determining whether the discrimination was

based on subject matter or viewpoint, we held that the school could bar the student from "promot[ing] a religious message through the channel of a benign classroom activity." *Id.* at 280.

The regulation at issue in this appeal is different from that in *Walz.* As the District Court noted, this case involves viewpoint discrimination. *Busch v. Marple Newtown Sch. Dist.,* No. 05-CV-2094, 2007 WL 1589507, at *7 (E.D. Pa. May 31, 2007). The teacher's description of "All About Me" week left the subject matter of the assignment open-ended, stating: "Each child will have the opportunity to share information about themselves [sic] during their 'All About Me' week." Furthermore, the description encouraged discussion of the "child's family, hobbies, and interests," and invited parents to "come to school to share a talent, short game, small craft, or story" during their child's week. Accordingly, Donna Busch's attempt to read Psalm 118 to her son's class fell within the specified subject matter *i.e.,* something of interest to her son and important to his family and the sole reason for excluding her speech was its religious character. Psalm 118 does not contain vulgar or lewd language, *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 685 (1985) ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission."), nor does it praise illegal activities, *Morse v. Frederick,* 127 S. Ct. 2618, 2629 (2007) (school was justified in restricting speech that could be "reasonably viewed as promoting illegal drug use"), and there is no evidence that Busch's reading would have caused any sort of classroom disruption, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 513 (1969).

Instead, the challenged speech was responsive to the assignment but approached it from a religious perspective because religion is most important to the Busch family. As the Supreme Court has observed, particularly in the context of religious expression, it can be difficult to discern what amounts to a subject matter unto itself, and what, by contrast, is best characterized as a standpoint from which a subject matter is approached. *See Rosenberger,* 515 U.S. at 831. However, I believe the school went too far in this case in limiting participation in "All About Me" week to nonreligious perspectives. As the District Court properly noted, Donna Busch was denied the opportunity to read the story her son chose because it expressed a *religious viewpoint,* rather than a secular one. This plainly constituted viewpoint, not subject matter, discrimination.[13] As then-Judge Alito recognized in his dissent in *C.H. v. Oliva,* 226 F.3d 198 (3d Cir. 2000) (en banc), such viewpoint discrimination is proscribed by the First Amendment unless the School District can show that allowing Busch's speech on a nondiscriminatory basis would have "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of other [.] [students]." *Id.* at 212 (quoting

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[13] As Busch argues, that this was viewpoint discrimination is made manifest by the fact that religious discussion had not been foreign to this classroom in the past. Apart from "All About Me" week activities, a different parent twice was invited to present to the class about Hanukkah and Passover. Therefore, in addition to having discriminated against the religious perspective *generally*—in contravention of *Lamb's Chapel, Rosenberger,* and *Good News*—the School District may have improperly discriminated *between* religious perspectives. Either way, the School District does not vigorously challenge the District Court's conclusion that its restriction of Busch's speech was viewpoint-based.

Tinker, 393 U.S. at 513). "When the government makes an avenue of communication available to the proponents of some views, the same opportunity must, absent exceptional circumstances, be afforded to others who wish to express their ideas in that manner, whether or not the governmental officials endorse or sanction the thoughts to be expressed." *Main Road v. Aytch,* 522 F.2d 1080, 1087 (3d Cir. 1975).

The viewpoint discrimination visited upon Busch differs from the treatment in *Walz.* Though we did not explicitly address the subject matter/viewpoint distinction in *Walz,* the district court's thorough analysis in that case shows that the regulation was viewpoint neutral; the school did not open the forum to discuss *any* subjects. By contrast, here the School District solicited speech, but then discriminated on the basis of viewpoint by refusing to allow Donna Busch to express herself from a religious perspective. Having opened the proverbial Pandora's box by inviting parents of kindergarten students to speak to the class about their children's "family, hobbies, and interests," the School District was required to respect the boundaries that it had set—however open-ended—provided that the speech remained germane to the subject matter and subject, of course, to the limitations set forth in *Tinker, Fraser,* and *Morse.* Because the basis of discrimination differs between the two cases, I do not find *Walz* controlling.[14]

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[14] I also depart from the majority's brief forum analysis in Part I.A of its opinion. As the Supreme Court noted in *Perry,* "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." 460 U.S. at 44. Accordingly, the Supreme Court "has adopted a forum analysis as a means of determining when the

The majority's adherence to *Walz* is, in my view, also flawed because of that case's reliance on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260

Government's interest in limiting the use of its property to the intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

The District Court found that the teacher's invitation converted the classroom into at most a limited public forum, which is created when the state opens a public place for expressive activity. *Perry*, 460 U.S. at 45. The District Court accurately noted that the School District "opened [the] classroom to specific people, the parents of [the] students, for a specific delineated purpose," to participate in the discussion of their children via "All About Me" week. *Busch*, 2007 WL 1589507, at *6. While the First Amendment "does not guarantee access to property simply because it is owned or controlled by the government," *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981), when the state has opened a forum but limits the expressive activity to certain kinds of speakers or the discussion of certain subjects as the School District did here—"[t]he Constitution forbids a state to enforce certain exclusions . . . even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45. Although the School District surely was not required to invite parents into the classroom in the first place, once it did so, it could only apply reasonable time, place, and manner regulations; content-based prohibitions "must be narrowly drawn to effectuate a compelling state interest." *Id.* at 46.

The majority summarily concludes that the classroom is a nonpublic forum. Even assuming this to be the case, the government could not restrict speech on the basis of the speaker's viewpoint. *Id.* at 45; *see also Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral.")* (emphasis added); *Child Evangelism Fellowship*, 386 F.3 d at 524 ("[E]ven if the. . . fora were not limited public fora but were closed, [the school] still could not engage in viewpoint discrimination.").

(1988). In *Hazelwood,* the Supreme Court upheld a principal's deletion of student articles on teen pregnancy and divorce from a school-sponsored newspaper. The Court held that the school could "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities as long as [its] actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Hazelwood is limited to situations in which the speech may be interpreted as coming from the school itself. As the Supreme Court acknowledged:

> The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . . Educators are entitled to exercise greater control over this second form of student expression.

Id. at 271.

The Court reaffirmed this principle in *Rosenberger,* explaining:

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have per-

> mitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . It does not follow, however . . . that viewpoint-based restrictions are proper when the University does not itself speak . . . but instead encourage[s] a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

515 U.S. at 833-34. *See also Pleasant Grove City v. Summum,* 129 S. Ct. 1125, 1131-34 (2009) (noting distinction between government speech and private speech).

I find *Hazelwood* inapposite to this appeal because there is no risk that Busch's speech would "bear the imprimatur of the school," *Hazelwood,* 484 U.S. at 271, nor will it be mistaken for "the [school's] own speech." *Rosenberger,* 515 U.S. at 834. Here, "All About Me" week was designed to help students "identify individual interests and learn about others." The teacher explained to parents that "[e]ach child will have the opportunity to share information about themselves [sic] during their 'All About Me' week." Students were invited to send in a poster with pictures of their favorite things, bring in special toys or snacks to share with the class, and parents were welcome to "come to school to share a talent, short game, small craft, or story." Everything from the title of the exercise—"All About *Me*" week—to the specific requests made by the teacher, indicated that the student (or, in reality, the parent) was speaking and not

the school.[15] This is distinguishable from the situation in *Hazelwood,* which contained numerous indicia of school-sponsorship, including: the newspaper was produced by students in a journalism class that was part of the school curriculum; the school financed the paper and it was the official school newspaper; the students' work was reviewed and graded by a faculty member and the entire paper was subject to the review of the principal prior to publication. *See Hazelwood,* 484 U.S. at 268-69.

As *Walz* itself indicates, "[i]ndividual student expression that articulates a particular view but that comes in response to a class assignment would appear to be protected." 342 F.3d at 279. "[N]othing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her *personal* views in class or in an assignment." *Oliva,* 226 F.3d at 213 (Alito, J., dissenting) (emphasis added). Donna Busch's speech came in response to the teacher's broad invitation to share something about her child; once invited, the School District was obliged to "tolerate" her speech, not to "affirmatively promote" it. *Hazelwood,* 484 U.S. at 271. "School- or government-sponsored speech occurs when a public school or other governmental entity aims 'to convey its own message.'" *Child Evangelism Fellowship,* 386 F.3d at 524 (quoting *Rosenberger,* 515 U.S. at 833). By contrast, when the school solicits the expression of "a diversity of views from private speakers," the expression that results is private. *Id.*

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[15] The likelihood that a kindergarten student would engage this assignment without parental influence and control is exceedingly remote. And the various approaches that a parent might take in this regard are as idiosyncratic as the number of parents.

In *Walz*, this Court seemed concerned that young students would not be able to distinguish between school-sponsored speech and speech from private individuals, and "the school may wish to avoid the appearance of endorsing certain speech." 342 F.3d at 277. Accordingly, we set forth a number of factors against which to measure the propriety of student expression in an elementary school setting, including: the type of speech; the age of the speaker and audience; the school's control over the activity in which the expression occurs; and whether the school solicits individual views from students during the activity. *Id.* at 278.

The *Walz* factors strike me as highly manipulable and therefore may encompass speech—such as the expression at issue in this case—that will not be reasonably perceived as school-sponsored. Even kindergarten students are capable of distinguishing between personal "show and tell" activities and school-sponsored instruction. As we observed in *Walz:*

> The appropriateness of student speech must be viewed in its educational context. For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; likewise, a lesson that includes a mock debate invites individual student expression on the relevant topic. In those scenarios, the student speaker is expressing *himself* in the context of a school assignment or activity *where the school has sought students' personal views.*

342 F.3d at 278 (emphasis added).

The speech at issue in this appeal closely resembles a "show and tell" exercise. Accordingly, Donna Busch's speech did not "bear the imprimatur of the school" and *Hazelwood* is inapposite.[16]

III.

Finally, I note that even if we were to find that *Hazelwood* should control this case because any speech to young children is likely to be perceived as being school-sponsored, this would not conclude our inquiry. In holding that a school may regulate school-sponsored expressive activities so long as the regulation is "reasonably related to legitimate pedagogical concerns," the *Hazelwood* Court justified the principal's decision to discriminate on the basis of *content;* but that decision does not necessarily offer any justification for allowing educators to discriminate based on *viewpoint* absent a compelling government interest.

As the Supreme Court held in *Hazelwood,* "educators do not offend the First Amendment by exercising editorial control over the *style* and *content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legiti-

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[16] Because I find that the speech in question could not have borne the imprimatur of the School District, I also reject the District Court's conclusion that the School District's viewpoint discrimination was necessary to avoid an Establishment Clause violation. "The Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion." *Oliva,* 225 F.3d at 211 (Alito, *J.*, dissenting) (citing *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 763-70 (1995) (plurality)). Because the speech came from Busch and cannot be considered school-sponsored, it did not violate the Establishment Clause.

mate pedagogical concerns." 484 U.S. at 273 (emphasis added). The school officials in that case conceded that any restrictions on school-sponsored student speech must be viewpoint neutral. *Id.* at 287 n.3 (Brennan, J., concurring). More fundamentally, if schools could impose viewpoint-based restrictions on all student speech that might be perceived as school-sponsored, the promise of *Tinker*—that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"—would mean very little. *Tinker,* 393 U.S. at 506.

Because *Hazelwood* did not address the issue of viewpoint discrimination, the question of whether school-sponsored speech can discriminate on the basis of viewpoint remains open and our sister courts of appeals are split on this issue. Some circuits have found that *Hazelwood* requires that the school's regulation only be reasonably related to pedagogical concerns. *See Fleming v. Jefferson County Sch. Dist.,* 298 F.3d 918, 926-29 (10th Cir. 2002); *Ward v. Hickey,* 996 F.2d 448, 454 (1st Cir. 1993); *see also C.H. ex rel. Z.H. v. Oliva,* 195 F.3d 167, 172-73 (3d Cir. 1999), *vacated and reh'g en banc ("Hazelwood* clearly stands for the proposition that educators may impose *non-viewpoint neutral* restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns.") (emphasis added). In essence, these courts read *Hazelwood* as establishing a rational basis standard for speech in the public school setting. The District Court embraced this standard, holding that "schools may restrict speech *even based on its viewpoint* `so long as their actions are reasonably related to legitimate pedagogical concerns.'" *Busch,* 2007 WL 1589507, at *9 (emphasis added).

By contrast, other circuit courts of appeals have interpreted the *Hazelwood* standard to require that a school's restriction be not only reasonable, but also viewpoint neutral. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626, 629-30 (2d Cir. 2005); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991); *Searcey v. Harris*, 888 F.2d 1314, 1320 (11th Cir. 1989); *see also Oliva*, 226 F.3d at 211 (Alito, J., dissenting). Citing these cases, Busch argues that when a public school opens a limited public forum, the general rule prohibiting viewpoint-based restrictions remains effective despite *Hazelwood*.

Without explicitly embracing either of these two perspectives vis-à-vis viewpoint discrimination, we concluded in *Walz* that "in the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval." 342 F.3d at 280 (citing *Hazelwood*, 484 U.S. at 273). Given the school's valid educational purposes, this Court reasoned, its actions were appropriate. *Id.* The Court did not explain its level of scrutiny, however. Likewise, in the present case, the majority makes sparse mention of *Hazelwood* and does not attempt to justify the school's viewpoint discrimination under either rational basis review or strict scrutiny.[17]

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[17] Neither the *Walz* court nor the majority here would have had occasion to clarify whether *Hazelwood* disallowed viewpoint discrimination, because, as noted above, neither opinion addressed the question whether the discrimination was based on subject matter or viewpoint in the first place.

If we wish to conclude that *Hazelwood* grants schools the power to discriminate on the basis of viewpoint, I think we should do so explicitly. This Court's approach in *Walz* and in this appeal, however pragmatic or commonsensical, lends itself to ad hoc jurisprudence. I recommend that we establish clear rules regarding viewpoint discrimination in the classroom. "The need for specificity is especially important where, as here, the regulation at issue is a 'content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.'" *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (quoting *Reno v. ACLU*, 521 U.S. 844, 871- 72 (1997)); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'") (citation omitted).

IV.

Clearly, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Fraser*, 478 U.S. at 682. It does not follow, however, that the state may regulate one's viewpoint merely because speech occurs in a schoolhouse—especially when the facts of the case demonstrate that the speech is personal to the student and/or his parent rather than the school's speech. The majority's desire to protect young children from potentially influential speech in the classroom is understandable. But that goal, however admirable, does not allow the government to offer a student and his parents the opportunity to express something

about themselves, except what is most important to them. With respect, I dissent.[18]

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[18] I agree largely with the sentiments Judge Barry expresses in her concurrence. Like Justice Thomas's recent concurring opinion in *Morse,* Judge Barry harkens back to a day when American schools were run by principals and teachers, acting *in loco parentis,* with little or no intrusion from lawyers, courts, and parents. *See Morse,* 127 S. Ct. at 2630-36 (Thomas, J., concurring). But this is not where we find ourselves today. As long as our schools continue to provide a forum for *some* parents and teachers to espouse their views in public schools, we must manage the speech of *all* parents and teachers within the guise of the First Amendment, lest we engage in the very sort of viewpoint discrimination that the Amendment was designed to protect against.

An "elementary school exception" or "kindergarten exception" to the First Amendment seems sensible to me. However, instead of establishing such an exception—which would delegate to schools the power to determine what is said and done in the classroom the majority opinion merely allows *this* school to prohibit a viewpoint, germane to the assignment, that it disfavors. In addition, I question whether the creation of such an exception should be the exclusive province of the Supreme Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 05-CV-2094

DONNA KAY BUSCH, in her individual capacity and as the parent and next friend of Wesley Busch, a minor,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*

SURRICK, J. MAY 31, 2007

MEMORANDUM & ORDER

Presently before the Court are Plaintiff Donna Kay Busch's Motion For Partial Summary Judgment (Doc. No. 20) and Defendants Marple Newtown School District, Marple Newtown School District Board of Directors, Robert Mesaros, and Thomas Cook's Cross-Motion For Summary Judgment (Doc. No. 19). For the following reasons, Defendants' Motion will be granted and Plaintiff's Motion will be denied.

I. BACKGROUND

Donna Kay Busch (hereinafter "Plaintiff") is the mother of Wesley Busch (hereinafter "Wesley"), a student at the Culbertson Elementary School ("Culbertson"), a division of the Marple Newtown School District. (Doc. No. 1 ¶ 2.1.) In October 2004, Wesley was in the kindergarten class at Culbertson,

taught by Jaime Reilly. (*Id.* ¶ 3.2; Doc. No. 20 at 4.) As part of her kindergarten social studies curriculum, Reilly included a unit of study called "All About Me." (Doc. No. 20 at 3; Doc. No. 19 at 7.) The unit was designed to be a "socialization" program in which students would "identify individual interests and learn about others" and would "identify sources of conflict with others and ways that conflicts can be resolved." (Kindergarten Social Studies Curriculum, Doc. No. 20 at Ex. B.) Reilly implemented this unit of study by featuring a different child each week. (Doc. No. 20 at 4.) During that week, the children were given the opportunity to "share information about themselves" by bringing in a "poster with pictures, drawings or magazine cut outs of [their] family, hobbies, or interests." ("All About Me" Handout, Doc. No. 20 at Ex. I.) The children were also asked to bring in a special toy or stuffed animal to introduce to the class and were permitted to bring a snack to share with the class. (*Id.*) Finally, Reilly invited parents to participate in the unit by coming to school to "share a talent, short game, small craft, or story" with the class. (*Id.*) Reilly asked that parents contact her one week in advance to schedule a day and time for their presentations.[1] (*Id.*)

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[1] There appears to be a dispute regarding how Plaintiff received information about this unit of study. Reilly attests that she gave the handout to parents during Back-to-School Night and subsequently gave the handout to Plaintiff, who had not attended that night. (Reilly Aff. at 1.) Plaintiff indicated that it was possible that she had received some paperwork on the unit and that she stopped by the school slightly more than one week before Wesley's "All About Me" week to discuss what she should do with Reilly. (Busch Dep. at 39, 60-61.) Plaintiff attests that Reilly then told her she could do "a favorite book . . . a dessert

Wesley responded to the "All About Me" week assignment in several ways. He and his mother together made a poster to bring to the class that was then displayed in the classroom during his week. (Doc. No. 19 at 15.) Plaintiff let Wesley choose what to place on his poster; he chose photographs of himself with his hamster, his brothers, and his parents, a picture of a church cut out from construction paper, and a photograph of his best friend at the time. (Busch Dep. at 74.) Plaintiff indicated that underneath the picture of the church, Wesley asked her to write several words: "'I love to go to the House of the Lord' or 'I like to go to church' or something like that." (Busch Dep. at 79.) Plaintiff saw the poster hanging in the classroom when she came in during Wesley's "All About Me" week. (*Id.* at 81.) Like the other children in the class, Wesley was given the opportunity to present his poster to the class and explain the various items on it. (Reilly Dep. at 62.)

In addition to this poster, Wesley's mother also came to Culbertson to do a presentation during his "All About Me" week. On October 15, 2004, Plaintiff came to Wesley's class to participate in his "All About Me" week by reading to the class. (Doc. No. 19

. . . just the different things on this paper [the "All About Me" handout]." (*Id.* at 61.) Reilly testified that she had no recollection of this meeting with Plaintiff. (Reilly Dep. at 176.) Defendants point out that while Busch regularly signed in for visits to the school, there is no record of her signing in during the month of October 2004 prior to Wesley's "All About Me" week. (Doc. No. 19 at 14; *id.* at Ex. 7.) While there is some dispute about how Plaintiff learned the details of the "All About Me" week invitation, these facts are not material to the disposition of the instant motions.

at Ex. 7.) In preparing for this presentation, Plaintiff told Wesley that the teacher indicated that she could come in and read his favorite book and asked what he would like her to read. (Busch Dep. at 37.) Wesley responded, "the Bible."[2] (*Id.*) Plaintiff describes herself as an Evangelical Christian. (Eric Busch Dep. at 41.) Her husband described an Evangelical as "one who brings God's word to the world." (*Id.*) Plaintiff testified that an Evangelical Christian is "someone who believes . . . the bible is the literal word of God." (Busch Dep. at 263.) Busch and Wesley routinely read the Bible together at breakfast and before going to bed. (*Id.* at 94.) Wesley often carried the Bible with him and frequently asked his mother to read to him from the Bible. (*Id.* at 93.)

The night before her visit, Plaintiff chose Psalm 118 from the Bible and decided to read verses 1 through 4 and verse 14. (*Id.* at 110, 114.) The King James Bible, from which Plaintiff planned to read (Busch Dep. at 226), translates those verses as follows:

> 1 Give thanks unto the Lord, for he is good; because his mercy endures forever.
>
> 2 Let Israel now say, his mercy endures forever.
>
> 3 Let the house of Aaron now say, that his mercy endures forever.

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[2] Defendants note that Wesley's babysitter, Judy Harper, testified that Wesley's favorite book in kindergarten was "Brown Bear, Brown Bear." (Doc. No. 19 at 16-17; Harper Dep. at 12.) Defendants contend that the Bible is really Plaintiff's favorite book. (Doc. No. 19 at 17; Busch Dep. at 95.)

> 4 Let them now that fear the Lord say,[3] that his mercy endures forever.
>
> * * *
>
> 14 The Lord is my strength and my song, and is become my salvation.

(Doc. No. 20 at 7 citing Psalms 118:1-4, 14 (King James).) Plaintiff chose verses from Psalms not only because she and Wesley frequently read from the Book of Psalms, but because she thought the children in class would like Psalms since they are similar to poetry, and because she wanted a reading that did not make any reference to Jesus, which she feared might upset some people.[4] (Busch Dep. at 111-13.)

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[3] Plaintiff's brief translates the first part of verse 4 as "Let them now hear the Lord say." (Doc. No. 20 at 7.) We assume this to be a typographical error as the King James version translates the phrase as "Let them now that fear the Lord say . . ."

[4] Defendants suggest that Plaintiff's choice of Psalm 118 was not so mundane as she intimates. Defendants cite to the expert witness report of Brian Ortale, who describes Psalm 118 as "a powerful tool for proselytizing by the Christian community." (Doc. No. 19 at Ex. 41, p. 4.) Ortale suggests that the Christian view of verse 22 ("the stone which the builders refused is become the head stone of the corner") is that "Jesus is the stone rejected by some but exalted by God." (*Id.*) As a result, verse 14 ("The Lord is my strength and my song, and is become my salvation") is a reference to Jesus who is viewed as the Lord and the source of salvation. (*Id.*) Ortale also offers the opinion that Evangelical Christians believe the following:

> [T]he work of the word is accomplished through the power of the word itself. . . . God, as it were, uses the Evangelical Christian missionary as a mouthpiece to speak the word but the power of the word is the power of God. . . . An Evangelical Christian believes the reading of the psalm conveys a blessing upon the one who comes in the name of

Plaintiff testified that she intended to read the verses without explanation and that if asked, she would respond that "it was ancient psalms and ancient poetry and one of Wesley's favorite things to hear and hopefully that would be the end of it and I could scoot out."[5] (*Id.* at 115.)

On the morning of October 15, 2004, Plaintiff accompanied her son to school. (Busch Dep. at 122.) She entered Wesley's classroom and informed Reilly that she was prepared to read to the class from Psalm 118. (*Id.* at 126-27.) Reilly responded that she would have to check with the principal, Thomas Cook. (*Id.* at 128.) Reilly then spoke to Principal Cook in the hallway (*id.* at 131) and when she returned, told Plaintiff that Principal Cook wanted to speak with Busch in the hallway (*id.* at 135). Once alone,

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> the Lord. . . . The reading of Psalm 118 conveys the power of the word of God upon the reader, and the reader receives a blessing for it. This makes the reading of Psalm 118 a religious exercise for an Evangelical Christian.

(*Id.* at Ex. 41, p. 7-8.) Plaintiff does not comment on this opinion and its explanation of Psalm 118. Clearly, there is some dispute as to the intention behind Plaintiff's desire to read Psalm 118 to Wesley's class. However, as we will discuss hereinafter, our legal conclusions are not dependent on an assessment of Plaintiff's subjective intent but rather derive from a consideration of the context as a whole.

[5] Plaintiff also testified that she gave some consideration to the fact that the children to whom she was reading might ask questions involving religious belief. (Busch Dep. at 264-65.) When asked what she would do if that occurred, Plaintiff responded: "You know, my intent was to just get in and read and leave. Had they asked any questions, I didn't – I don't know what I would have done. I probably would have, you know, maybe asked – just told them that it was just – I don't know what I would have done." (*Id.* at 265.)

Cook told Busch that reading the Bible to the class would be "against the law . . . of separation of church and state" (Busch Dep. at 139-40) and asked her to read from another book (Cook Dep. at 102). Cook determined that it was improper to read from the Bible to a class of kindergarten students because he felt that the "Bible is holy scripture. . . . [I]t's the word of God. And . . . reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view."[6] (Cook Dep. at 105-06.) Busch responded that her other son had just finished reading a book called *Gershon's Monster: A Story for the Jewish New Year* that he had taken from the school library and suggested that it was "the same thing that [she] was going to read." (Busch Dep. at 140.) Principal Cook responded: "Well, that's cultural and your son chose that book and these children are not choosing to hear from the Bible. . . . I can't let you do it."[7] (*Id.*) As a

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[6] Robert Mesaros, then Superintendent of the School District, supported Cook's response to Busch for the following reasons:

> In policy 220 it indicates that a student cannot – is not permitted to advocate a religious point of view or preference, and certainly a teacher is not permitted to read from the Bible to the students, and in this case the parent would be taking the place of the teacher in front of a group of students who are there because they must be there by state law, and they would be – a captive audience, and they would have no choice but to listen to Mrs. Busch . . . read the Bible if so permitted, and therefore it was assumed that the school district and the school was advocating or supporting the – whatever was going to be read by, in this case, Mrs. Busch.

(Mesaros Dep. at 158.)

[7] Plaintiff's Counsel, as part of his deposition questioning on the distinction between cultural and religious expression, asked

result of this conversation, Busch returned to the classroom and asked Reilly for a different book to read to the class. (*Id.* at 153.) Reilly offered Plaintiff a book about witches and Halloween, which Plaintiff declined,[8] and they settled on a book on counting. (*Id.* at 157-58.)

During Cook's conversation in the hallway with Busch, the door remained open. (Reilly Dep. at 183.) Reilly spent that time taking attendance and gathering notes from the children. (*Id.* at 182.) She could not hear any of the conversation between Busch and Cook. (*Id.* at 183.) Reilly never spoke with Wesley about the incident nor did she notice any change in his behavior or demeanor that day. (*Id.* at 183-84.)

Like Plaintiff, many other parents participated in the "All About Me" unit by coming to the class to read stories, share snacks, or do crafts. (Doc. No. 19 at Exs. 6, 7.) Among the stories that parents read

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Principal Cook and Ms. Reilly many questions that sought their opinions on proposed hypothetical situations. In particular, counsel asked questions comparing a presentation on the menorah to one about "the history of the cross and Jesus carrying the cross." (*See, e.g.*, Cook Dep. at 92.) Principal Cook drew a distinction between cultural symbols and religious expression (*see, e.g., id.* at 107-17) while Reilly explained that she could not answer the question without guessing because "that's not what happened in this situation." (Reilly Dep. at 101-02.) As will be discussed *infra*, we cannot make legal findings based on Defendants' opinions offered in response to purely hypothetical scenarios. As a result, we use this deposition testimony only to illuminate the actual circumstances before us.

[8] Busch did not recall the title of the book but did not want to read it because she did not believe in the subject matter of the book. (Busch Dep. at 158.)

were: *The Grinch Who Stole Christmas*, *The Jolly Roger*, and *Green Eggs and Ham*. (*Id.* at Ex. 7.) Reilly also keeps a library of books in her classroom from which she reads. Among the books she read to Wesley's class, there are a number of books about Christmas, Easter, and Hanukkah including: *Bear Stays Up for Christmas*, *Froggy's Best Christmas*, *The Wild Christmas*, *Ten Timid Ghosts on a Christmas Night*, *Christmas Trolls*, *The Best Easter Eggs Ever*, *Easter Bunny's On His Way*, *The Night Before Easter*, *Hooray for Hanukkah*, *The Magic Dreidels*, and *The Hanukkah Mice*. (Doc. No. 19 at Ex. 5.)

In addition to parent participation in the "All About Me" unit, one parent came to Reilly's class twice during the year to give presentations on Hanukkah and Passover. Linda Lipski, a parent of a child in Reilly's kindergarten class, offered to come to the class during the week of Hanukkah. (Reilly Dep. at 83-84.) After discussing her presentation with Reilly several weeks prior, Lipski brought in a menorah and a dreidel and read "a Blue's Clues Hanukkah story." (*Id.* at 84-86.) Reilly consulted with Principal Cook about this visit only to make sure it was okay, from a fire safety perspective, to light candles in the classroom. (*Id.* at 90-93.) Otherwise, Reilly indicated that she felt confident that the presentation would be appropriate: "Because Mrs. Lipski and I had already discussed the guidelines ahead of time and considering that Hanukkah is a part of our holiday Social Studies curriculum, I didn't feel – in my opinion I didn't need to consult ahead of time with an administrator about that." (*Id.* at 93.) Reilly also noted that both the menorah and dreidel are symbols used on activity work sheets in the social studies curriculum (*id.* at 95) and that there was a picture of

a Christmas tree hanging in the classroom (*id.* at 148). She also discusses Christmas and Kwanza as part of the winter holiday unit in the Social Studies curriculum.[9] (*Id.* at 100.) Later in the year, Lipski again offered to come to the classroom, this time to present on the holiday of Passover. (*Id.* at 117.) Lipski's Passover presentation consisted of the following: "Mrs. Lipski came into the classroom on [a specified date], she read *The Matzah Ball Fairy*[10] to the students and then offered the matzah ball with chicken soup if they'd like to taste it." (*Id.* at 121.) Reilly set up the presentation by discussing the spring holidays of Easter and Passover.

Marple Newtown School District has a policy regarding holiday observance in its schools. The policy expresses the following purpose:

> Our public schools represent a microcosm of society reflecting a pluralistic community enriched by diverse ethnic groups, religious [sic] and cultural heritage; positive resources to be respected and nurtured in education. . . . The Board affirms the worth and dignity of each individual. Sensitivity to each other is a critical component of the framework of the community.

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[9] When asked hypothetically whether she would allow a parent to come in and discuss the Christmas tree, Reilly responded: "In my opinion, if I was teaching about the holiday of Christmas and I wanted to use – or a parent – if they came in and wanted to show that there was a Christmas tree – to the best of my knowledge [they] could show that as a symbol of the Christmas holiday in the classroom." (Reilly Dep. at 149.)

[10] Reilly recalled that the book *The Matzah Ball Fairy* is about a "family [that] eats matzo balls[,] and they float because the matzo balls were light and fluffy." (Reilly Dep. at 123-24.)

(Doc. No. 19 at Ex. 10.) The policy lists as its authority, the First Amendment to the Constitution and the principle of "Separation of Church and State" and provides the following guidelines for principals regarding what is appropriate holiday observance in the schools:

1. Public schools should not be a forum (pupil or teacher) for expressing individual/personal religious preference/doctrine.
2. Religious symbols, cultural themes, etc., as a direct outgrowth of established curriculum, could be displayed together in a sensitively planned, centrally located cabinet. (No "créche" or Nativity scene should be displayed on school property.)
3. A secular "holiday" tree without religious ornamentation in one central location, rather than individual classroom trees, would be an appropriate symbol of the season.
4. Secular "holiday" music, without religious content, is appropriate for all concerts, music classes, and classroom activities.
5. Parties, without religious theme or content, may be planned as a symbol of the season.

(*Id.*) With respect to the "holiday tree," Principal Cook explained that teachers and students may call the tree a "Christmas tree" if they wish and noted that it was called a "holiday" tree in the School Board Policy but that he has "never told people they can't call it a Christmas tree." (Cook Dep. at 61, 67.)

On May 3, 2005, Plaintiff filed this lawsuit against Defendants Marple Newtown School District, Marple

Newtown School District Board of Directors, Robert Mesaros, and Thomas Cook, stating claims under both the Federal and Pennsylvania Constitutions. The Complaint asserts the following six claims: (1) violation of the Free Speech Clause of the United States Constitution; (2) violation of the Free Communication Clause of the Pennsylvania Constitution; (3) violation of the Establishment Clause of the United States Constitution; (4) violation of the Establishment Clause of the Pennsylvania Constitution; (5) violation of the Equal Protection Clause of the United States Constitution; and (6) violation of the guarantee of equal rights and prohibition on discrimination in the Pennsylvania Constitution. (Doc. No. 1 at 9-13.) Plaintiff seeks a declaratory judgment, actual and nominal damages, and litigation costs and attorney's fees. (*Id.* at 14.) On February 23, 2006, Plaintiffs filed the instant Motion for Partial Summary Judgment, seeking judgment in their favor as to the liability of Defendants on all of the claims in the Complaint. (Doc. No. 20.) Defendants filed the Cross-Motion for Summary Judgment asserting that they were entitled to judgment in their favor on the above claims on the same day. (Doc. No. 19.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could

return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicions' to support its claim." *Townes v. City of Phila.*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). We do not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

A. Free Speech Claim

Plaintiff contends that in preventing her from reading a passage from the Bible to her son's kindergarten class, Defendants deprived her and her son, Wesley, of their rights to free speech.[11] We observe, at the outset, that this case raises some very perplexing questions of Constitutional law. As the Second Circuit noted in *Peck v. Baldwinsville Central School*, 426 F.3d 617 (2d Cir. 2005), the case before us "invites us to cut a path through the thorniest of constitutional thickets-among the tangled vines of public school curricula and student freedom of expression." *Id.* at 620. It is particularly difficult given the confusion both in the courts and in schools regarding the difference between appropriate cultural education and prohibited religious expression. *See Roberts v. Madigan*, 921 F.2d 1047, 1053 (10th Cir. 1990) ("Here, we face the difficulty of determining the proper balance between the freedom from religious coercion created by state-sponsored religion and the inescapable reality that our culture

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[11] We note that Plaintiffs contend that Defendants' actions violated both Wesley's and Donna Busch's rights to free speech. Because it was Donna Busch who attempted to exercise her free speech rights in reading the Bible to Wesley's class, we assume that Plaintiffs intend to invoke Wesley's rights to free speech by virtue of the corollary "right to receive information and ideas." *Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). The Supreme Court has indicated that "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them" and that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Id.* (emphasis in original).

is permeated by religious symbols and rituals. Nowhere has the proper line of demarcation been more difficult to define than in our nation's public schools."). We will approach this matter as we do all questions of free speech rights, regardless of whether they implicate religious expression.[12]

1. *Type of Forum*

The first step in any free speech analysis is to determine the type of forum at issue, a determination that will dictate the level of scrutiny that must be applied to state actions that restrict speech.[13]

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[12] Defendants only briefly discuss free speech issues in their briefs, arguing instead that the courts have absolutely precluded bible reading in public schools. (*See* Doc. No. 19 at 7-19.) Defendants rely on *School District of Abington Township v. Schempp*, 374 U.S. 203, 224 (1963), and the 1963 Pennsylvania Attorney General's Opinion, *Bible Reading in Public Schools*, 30 Pa. D. & C.2d 643, 647 (Pa. Dept. Just. 1963), to support their argument. We note, however, that both *Schempp* and the Attorney General's Opinion address the issue of a school authority figure or classroom teacher reading the Bible as a mandatory exercise in the school and thus rest their findings on the Establishment Clause. Because this case involves the more complicated problem of a student and/or parent seeking to read the Bible as part of a "show and tell"-type exercise, we must first address the issues through a free speech analysis and then through the Establishment Clause.

[13] The free speech analysis under the Federal Constitution also applies to the free speech claim under the Pennsylvania Constitution. *See Com., Bureau of Prof'l and Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340, 343 (Pa. 1999) ("In analyzing a case such as the present one where the argument is based on Article I, § 7 of the Pennsylvania Constitution, we observe the same minimum standards of analysis and substantive protection as the Supreme Court of the United States has required under the federal constitution."). As a

Peck, 426 F.3d at 625. The traditional public forum is the most "speech-protective" in that "content-based restrictions will be upheld only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end." *Peck*, 426 F.3d at 626 (quoting *Make The Road by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004)). Next along the spectrum are "designated" and "limited" public fora. A designated public forum is created when the state has opened for public discourse a place that is not traditionally open to public assembly. *Id.* In such a forum, the government may restrict speech only when it could have done so in a traditional public forum. *Id.* Similarly, a limited public forum is created when the state opens a non-public forum with some limits on the nature of the expressive activity. *Id.* Finally, a non-public forum is "neither traditionally open to public expression nor designated for such expression by the State." *Id.* The standards for limited and non-public fora are similar. In both, the government can restrict speech—including the content of such speech—so long as the restrictions are reasonable and viewpoint neutral. *Id.*

The incident in this case took place at an elementary school and, more particularly, in a kindergarten classroom. As described above, the setting was a "show and tell"-type exercise in which parents were invited into the classroom to share a story, game, craft or snack as part of their children's "All About

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result, this section applies to both of Plaintiffs' free speech claims (Counts I and II).

Me" week. This was clearly not a public forum.[14] The Supreme Court has held that "school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public or by some segment of the public, such as student organizations." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (internal citations and quotations omitted). Here, Reilly, the kindergarten teacher, opened her classroom to specific people, the parents of her students, for a specific delineated purpose. At most, the classroom became a limited public forum in which the state had the right to restrict the nature of the expressive activity.

2. *Level of Scrutiny in this Forum*

Whether Reilly's classroom during the "All About Me" unit was a limited or non-public forum, the same basic standard applies. While the government may restrict speech in these fora, such restrictions must still be reasonable and viewpoint neutral. *Peck*, 426 F.3d at 626. The initial question to be resolved is whether, in preventing Plaintiff from reading the Bible to Wesley's class, Defendants restricted the content or viewpoint of Busch's speech. "[D]rawing a precise line of demarcation between content discrimination, which is permissible in a non-public forum, and viewpoint discrimination, which tradi-

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[14] Both parties agree with this premise. Defendants argue this point in their Motion. (*See* Doc. No. 19 at 20-22 (arguing that the "All About Me" unit of study did not constitute a public forum in the kindergarten classroom).) Plaintiffs do not quarrel with this notion. (Doc. No. 23 at 3 ("Wesley Busch's classroom was not a public forum, and the school is afforded wide latitude in implementing the curriculum.").)

tionally has been prohibited even in non-public fora, is, to say the least, a problematic endeavor." *Id.* at 630. This problem is all the more difficult in the context of religious expression since "[i]t is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995), *quoted in Peck*, 426 F.3d at 630.

Plaintiff, relying on then-Judge Alito's dissent in *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000), argues that the school's action in preventing the Bible reading was viewpoint discrimination. Judge Alito commented generally that "discrimination based on the religious character of speech is viewpoint discrimination." *Id.* at 210 (Alito, J., dissenting). This contention was based on two Supreme Court cases: *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). In *Lamb's Chapel*, the Court found prohibited viewpoint discrimination in a school's decision to permit use of school facilities by a variety of groups while denying use of the property to a group wanting to address child-rearing issues from a Christian perspective. *Lamb's Chapel*, 508 U.S. at 393-94; *Oliva*, 226 F.3d at 211. Similarly, *Rosenberger* held that the university's refusal of student-activities funds to a religious student publication solely because of its religious perspective was likewise prohibited viewpoint discrimination. *Rosenberger*, 515 U.S. at 831; *Oliva*, 226 F.3d at 211. In both of these cases, the government action with which the Court took issue did not prevent speech that merely involved

religion, but instead prevented speech because of its religious perspective. Because the restriction was based on the religious perspective of the group, such action is viewpoint discrimination. If, however, a school, seeking to promote the study of mathematics, offered funding to groups focused on mathematics and, in that context, denied funding to a group that studied religion, the conclusion would be different. Such action would constitute permissible content-based discrimination. Thus, the context of and intent behind the government action together with the nature of the speech inform the determination of whether the action amounts to content or viewpoint discrimination.

In this case, we agree with Plaintiff that the school's action constituted viewpoint discrimination. Plaintiff intended to read the Bible to the kindergarten class and not merely to talk about the Bible or its history as part of the social studies curriculum. The particular Biblical verses she intended to read certainly convey a religious perspective or viewpoint. For example, the very first verse she planned to read states: "Give thanks unto the Lord, for he is good; because his mercy endures forever." In addition, Principal Cook's explanation for his action indicates that he was motivated by a concern about the religious viewpoint of the material. He prohibited the Bible reading because it was "promoting religion and . . . proselytizing for promoting a specific religious point of view." (Cook Dep. at 105-06.) Moreover, Reilly, with Principal Cook's permission, had previously allowed discussions of Hanukkah, Christmas, Passover, and Easter in her classroom as part of the regular curriculum. Clearly, the school did not preclude all speech that dealt in any way with

religion but precluded speech in this situation because it expressed a religious viewpoint, which Principal Cook believed was inappropriate in the context of a kindergarten classroom. We are satisfied that the school's action amounted to viewpoint discrimination.

3. *Under What Circumstances is Viewpoint Discrimination Permitted?*

Plaintiff's argument to the contrary notwithstanding, our conclusion that Defendants' action constituted viewpoint discrimination does not end the inquiry. The restriction of Busch's speech in this case came in the context of a parent presenting to a kindergarten class, a context that is very relevant to the lawfulness of the school's action. While viewpoint discrimination is generally not permissible even in a non-public forum, there are circumstances in which it may be allowed.

The circumstances under which viewpoint discrimination is permitted is a matter of disagreement among the Circuit Courts. There is broad agreement that under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), private student expression may not be limited based on its viewpoint unless the school demonstrates a compelling interest such as the need to prevent substantial disorder or the invasion of the rights of others. *Id.* at 511, 513; *see also Oliva*, 226 F.3d at 211-12 (Alito, J., dissenting). However, the Court in *Hazelwood* appeared to take a different approach for speech that was school-sponsored or that "members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 270-71 ("The question whether the First Amendment requires a

school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."). The *Hazelwood* Court held that:

> the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 272-73. Circuit Courts have reached conflicting conclusions regarding the meaning of *Hazelwood*. Several courts have concluded that viewpoint based decisions by educators are permissible in circumstances similar to those presented in *Hazelwood*, while others maintain that *Hazelwood* did not change the basic prohibition against viewpoint discrimination.[15] We will address this question in

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[15] *See Peck*, 426 F.3d at 632 n.9 (First and Tenth Circuits allow viewpoint discrimination by schools; Ninth and Eleventh maintain general requirement of viewpoint neutrality; and Third Circuit held that a viewpoint restriction "may reasonably be related to legitimate pedagogical concerns" and therefore constitutional, but on a rehearing en banc, the circuit was equally-divided on this question) (citing *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d

light of Third Circuit authority, which is not definitive on the issue but provides sufficient guidance to make a determination.

Before addressing our interpretation of *Hazelwood*, we will first discuss why *Hazelwood* is clearly applicable to the case before us. The Supreme Court made it clear in *Hazelwood* that speech that might be viewed as school-sponsored should be analyzed in its own category. *Hazelwood*, 484 U.S. at 270-71. The speech at issue in *Hazelwood* appeared in the student newspaper and thus bore the imprimatur of the school. Similarly, this case presents a situation in which the students, here kindergartners, would likely view the speech at issue as school endorsed. In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the Supreme Court noted that in determining whether there is a perception of government-endorsed speech, the focus must be on the effect of the speech or display on the listeners and viewers. "The effect of the display depends upon the message that the government's practice communicates: the question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity,

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817, 829 (9th Cir. 1991) (*en banc*); *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir. 1999), *on reh'g en banc* 226 F.3d 198 (3d Cir. 2000)).

In *Peck*, the Second Circuit concluded that "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even* if reasonably related to legitimate pedagogical interests," *Peck*, 426 F.3d at 633 (emphasis in original), thereby agreeing with the Ninth and Eleventh Circuits.

turns upon the context in which the contested object appears."[16] *Id.* at 595 (internal citations and quotations omitted). Here, the context was a kindergarten classroom. The speech at issue would have come from a parent, typically seen as an authority figure by young children, standing at the front of the classroom to present in place of the teacher and as part of the school curriculum. This situation clearly creates a perception of school-endorsed speech.[17] *See Walz ex*

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[16] Justice O'Connor's observations with regard to the endorsement question are also instructive:

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. . . . If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (*quoted in Roberts*, 921 F.2d at 1057). After citing Justice O'Connor's approach, the Tenth Circuit determined that in the context of a teacher who sought to silently read his Bible during class, "it is reasonable to conclude that not all of [the teacher]'s students would receive a purportedly secular message." *Roberts*, 921 F.2d at 1057.

[17] Plaintiffs contend that it is "nonsense" to argue that "a parent carries a mantle of authority that, in the minds of students, is indistinguishable from teachers." (Doc. No. 20 at 19.) Moreover, Plaintiffs assert that "to suggest that Wesley's classmates would confuse Wesley's mother for a teacher, principal, or other school administrator does not fairly credit the perceptive capabilities of five and six year-olds." (*Id.*)

rel. Walz v. Egg Harbor Tp. Bd. of Educ., 342 F.3d 271, 277 (3d Cir. 2003) ("[I]n an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred. . . . While secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis, kindergartners and first graders are different."); *see also C.H. v. Oliva*, 990 F. Supp. 341, 354 (D.N.J. 1997), *aff'd*, 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir. 1999), *aff'd by an equally divided court on reh'g en banc*, 226 F.3d 198 (3d Cir. 2000) (noting in context of student reading passage from Bible to his first grade classmates: "If [student]'s teacher were to praise him for completing his reading assignment skillfully, (*i.e.* by saying something like 'very good'), it is not unlikely that a child in first grade could interpret that comment as an endorsement of the story and the book."); *Peck*, 426 F.3d at 629 (finding application of *Hazelwood* appropriate to speech in form of student's poster where it was "indisputably part of the school curriculum . . . supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) ("Few activities bear a school's 'imprimatur' and 'involve pedagogical interests,' more significantly than

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Plaintiff misses the point. The concern is not that the students will think that Wesley's mother is actually a teacher or school administrator, but rather that a parent presenting to the class carries the same level of authority as does a teacher and that in the context of a classroom, that authority creates the perception that the school endorses the speech of the parent.

speech that occurs within a classroom setting as part of a school's curriculum."); *Roberts*, 921 F.2d at 1057 (affirming district court's view that teacher reading Bible to himself "communicated a message of endorsement of a religion to the impressionable ten-, eleven-, and twelve-year-old children in his class."). We are satisfied that *Hazelwood* clearly applies to the instant situation.

In addition, we are persuaded that the proper interpretation of *Hazelwood* suggests that in contexts where there is a likelihood of a perception of school-endorsed speech, the lower standard applies to a school's actions restricting that speech. Thus, schools may restrict speech even based on its viewpoint "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 272-73. In reaching this conclusion, we are guided by recent Third Circuit cases that dealt explicitly with religious speech by elementary school students as part of classroom or educational activities. As noted above, the Third Circuit in *C.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), originally endorsed this view of *Hazelwood*, permitting a school to prevent a student from reading the Bible to his first grade classmates. *Id.* at 172-73 ("Hazelwood clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns."). However, this opinion was vacated, and a rehearing en banc was granted. 197 F.3d 63 (3d Cir. 1999). On rehearing, the court split evenly on the bible reading question, affirming the District Court without explication and dismissing a second claim about a

religious-themed poster on procedural grounds. 226 F.3d 198 (3d Cir. 2000). Since such decisions have no precedential value, *see Rutledge v. U.S.*, 517 U.S. 292, 304 (1996), the *Oliva* case leaves us with little reliable guidance.

Nevertheless, in 2002, the Third Circuit addressed a similar question in *Walz ex rel. Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003). *Walz* dealt with two instances in which an elementary school prevented a child from distributing religious-themed gifts in the context of school holiday parties. The parties were held in class, and the Parent Teacher Organization ("PTO") encouraged parents to donate gifts that the PTO would then distribute so as not to single out children who did not or could not bring presents. *Id.* at 273. In the first instance, a student, in pre-kindergarten at the time, brought and tried to distribute pencils with the imprint "Jesus [Loves] The Little Children" (heart symbol). *Id.* The teacher confiscated the pencils, and the school superintendent determined that "the pencils could not be distributed because the young children and their parents might perceive the message as being endorsed by the school." *Id.* In the second instance, the student, now in kindergarten, sought to distribute candy canes during the class holiday party that had a story called "A Candymaker's Witness" attached. *Id.* at 273-74. The story described the candy cane as incorporating symbols of the birth, ministry, and death of Jesus and concluded with a prayer that the candy cane be used "to witness to The Wonder of Jesus and His Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today." *Id.* at 274. The school responded that the student

could hand out the candy canes before school, during recess, or after school, but not during the classroom party. *Id.* The Third Circuit affirmed the District Court, concluding that in both instances, the school's action was justified and did not violate the student's First Amendment rights. *Id.* at 280-81. In reaching this conclusion, the Third Circuit emphasized the importance of the age of the children involved and the fact that "as a general matter, the younger the students, the more control a school may exercise." *Id.* at 276. The Court also noted that the risk that speech will be perceived as school-endorsed is heightened in an elementary school classroom. *Id.* at 277. The Third Circuit distinguished between "expression that symbolizes individual religious observance such as wearing a cross on a necklace, and expression that proselytizes a particular view." *Id.* at 278-79. Citing *Hazelwood*, the Court ultimately concluded that "[i]n the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval" and found such action to be appropriate given the school's "valid educational purpose." *Id.* at 280-81.

Despite the fact that *Walz* does not explicitly endorse the original *Oliva* panel's view of *Hazelwood*, its language indicates that intention. The case is particularly instructive for our purposes. Not only do we read *Walz* as permitting viewpoint discrimination in limited circumstances when there is a valid educational purpose, we are also persuaded that *Walz* confirms that a school's intent to avoid endorsing proselytizing speech is one such valid pur-

pose. Thus, a school's avoidance of an Establishment Clause violation, the perception that it promotes or endorses a religious viewpoint, is a legitimate interest that justifies viewpoint discrimination.

The instant case is remarkably similar. Plaintiff's reading of the Bible to the kindergarten class could easily have been interpreted by the young students as endorsed by the school. In addition, the principal's explicit intent was to prevent speech that proselytized or promoted a specific religious viewpoint so as not to violate the Establishment Clause's prohibition on state support and promotion of religion. (*See* Busch Dep. at 139-40 (Cook told Plaintiff she could not read the Bible because "it's against the law . . . of separation of church and state . . .").) The actual verses that Busch planned to read serve only to support Principal Cook's concern. For example, "Give thanks unto the Lord, for he is good; because his mercy endures forever" indisputably communicates a religious message. *Cf. County of Allegheny*, 492 U.S. at 598 (finding the phrase "Glory to God in the Highest!" in a banner over a crèche to be "indisputably religious-indeed sectarian-just as it is when said in the Gospel or in a church service"). Thus, the school acted appropriately in preventing the Bible reading because it was justifiably concerned that the public school would be perceived as endorsing speech that promoted a religious viewpoint, a violation of the Establishment Clause.

Plaintiff attempts to distinguish *Walz* by pointing to the *Walz* court's distinction between speech that is invited by an activity where the school seeks students' personal views and speech that is disrup-

tive to the educational setting. The *Walz* Court did make this distinction, noting:

> For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; likewise, a lesson that includes a mock debate invites individual student expression on the relevant topic. In those scenarios, the student speaker is expressing himself in the context of a school assignment or activity where the school has sought students' personal views.

Walz, 342 F.3d at 278. However, in the next sentence the court explained that "in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message." *Id.* While Plaintiff is correct that the "All About Me" unit is similar to a "show and tell" exercise, reading verses of the Bible to students is significantly different than passing around an ornament and describing its personal meaning. The "All About Me" exercise certainly invited student expression and parent participation. Its goal was to help students learn about one another. It did not, however, call for students to express their specific religious views as would a mock debate that explicitly provides a context for such expression. Plaintiff could have responded to the assignment by speaking with the children about the importance of religion in their family life and describing the time she and Wesley spend reading the Bible and attending church. Such a presentation would have been responsive to the assignment and would not have promoted a specific message. The school had a valid

educational purpose in preventing Plaintiff's reading of the Bible to a captive audience of kindergarten students. Under *Hazelwood*, the school's action was proper since it was reasonably related to legitimate pedagogical concerns.

4. *The School's Action was Justified Even Under the Higher Standard*

Even if we were to conclude that *Hazelwood* does not permit viewpoint discrimination in the circumstances described, we would still find the school's action to be appropriate under the higher standard that requires a compelling interest to restrict speech based on its viewpoint. *See Oliva*, 226 F.3d at 211 (Alito, J., dissenting) ("[A] public school may even restrict speech based on viewpoint if it can show a compelling interest for doing so."). [18] While the Supreme Court has not found a school's avoidance of an Establishment Clause violation to be a compelling interest in this context, it has left open that possibil-

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[18] We note that this case can be distinguished from Judge Alito's dissent in *Oliva*. In *Oliva*, Judge Alito commented on the school's action in taking down and re-posting in a less prominent location a poster depicting Jesus. The poster was made by a student in response to an assignment to make posters depicting what the students were "thankful for." *Oliva*, 226 F.3d at 201. Judge Alito found the school's action to be impermissible viewpoint discrimination after concluding that "a reasonable observer would not have viewed the exhibition of [the poster] along with the secular posters of his classmates as an effort by the school to endorse religion in general or Christianity in particular." *Id.* at 212. In contrast, Plaintiff's reading of Biblical verses to kindergarten students would certainly have been viewed as carrying such an endorsement.

ity.[19] *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (holding that "the interest of the University in complying with its constitutional obligations [avoiding violation of the Establishment Clause] may be characterized as compelling"); *see also Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) ("a State has a compelling interest in not committing *actual* Establishment Clause violations" (emphasis in original)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-113 (2001) ("We have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.").[20]

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[19] In each of the cases in which the Supreme Court has spoken of avoiding Establishment Clause violations as a compelling interest, it has concluded that under the particular circumstances before it, the state's actions went beyond avoiding such a constitutional violation and that such actions did not constitute a compelling interest.

[20] *Good News Club* is easily distinguishable from the instant case because the Court in *Good News Club* concluded that there was no reason to view the religious activity as school endorsed. In that case, the school, relying on the Establishment Clause, had refused to allow a religious club to use its facilities. However, because the club's meetings were held after school hours, were not sponsored by the school, and required parental permission to attend, there was no real concern that children would perceive school endorsement. *Good News Club*, 533 U.S. at 112-18. As a result, there was no real Establishment Clause problem. In this case, the perception of school endorsement of a

We conclude that a school's avoidance of an Establishment Clause violation is a compelling interest such that it justifies viewpoint based restriction of speech. In situations where the school is called upon to permit or deny a student's religious expression, the rights of the various parties are in conflict. The student speaker certainly has a right to free speech, albeit limited by the context of the school environment. The student listeners, their parents, and all other school community members have a right to be free from government promotion of religion. In this context, the "right to freedom of speech . . . must yield to compelling public interests of greater constitutional significance." *Fink v. Bd. of Ed. of Warren County Sch. Dist.*, 442 A.2d 837, 842 (Pa. Commw. Ct. 1982). The purposes behind the Establishment Clause are clear:

> The Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.

Engel v. Vitale, 370 U.S. 421, 431-32 (1962). The Supreme Court has made it clear that the require-

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religious perspective was a justifiable concern given the fact that the speech at issue was to occur in the classroom as part of the curriculum and was to be presented by a parent to a captive audience of kindergarten students. In this context, avoiding an Establishment Clause violation was certainly a compelling interest.

ment of government neutrality towards religion does not, in any way, indicate a hostility towards religion. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435. These principles compel public schools to be vigilant in avoiding promotion of religion or even the perception of school-endorsed promotion. Such action is undoubtedly a compelling state interest and certainly justifies viewpoint based restrictions of speech when that speech may reasonably be seen as bearing the imprimatur of the public school.[21] Accordingly, we conclude that Defendants did not violate Plaintiff's free speech rights in preventing her from reading the Bible to her son's kindergarten class and are compelled to grant Defendants' Motion for Summary Judgment on this claim.

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[21] Plaintiff argues that "allowing a child to express his love of the Bible – in an exercise designed to highlight *his* interests" cannot possibly be seen to advance one religion over another, or religion over non-religion. (Doc. No. 20 at 18.) However, there is a distinct difference between expressing one's love of the Bible and reading verses from it. The former can be accomplished, without creating an Establishment Clause problem, by speaking about the Bible in a way that does not promote a religious viewpoint or carry the potential to offend those who do not similarly believe. Reading verses from the Bible in the context of a kindergarten class, cannot be done without, at the very least, creating the perception of the school's promotion of religion.

B. Establishment Clause Claim

Plaintiffs also contend that Defendants' actions constituted a violation of the Establishment Clause.[22] Defendants argue that the opposite is true and that they took action specifically to avoid such a violation. Under the Establishment Clause of the First Amendment, "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I.[23] The Supreme Court has made clear that this clause requires governmental neutrality *vis-a-vis* religion in that "government should not prefer one religion to another, or religion to irreligion." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Claims of violations of the Establishment Clause are governed by the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test requires the following: "First, the [government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [government action] must not

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[22] The Pennsylvania Supreme Court has held that "the provisions of Article I, Section 3 of [the Pennsylvania] constitution do not exceed the limitations in the [F]irst [A]mendment's [E]stablishment [C]lause." *Springfield Sch. Dist., Del. County v. Dep't of Ed.*, 3 97 A.2d 1154, 1170 (Pa. 1979) (citing *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366, *cert. denied*, 419 U.S. 967 (1974)); *see also Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005). As a result, this section applies to both of Plaintiff's Establishment Clause claims (Counts III and IV).

[23] The Fourteenth Amendment imposes this limitation on the states and their political subdivisions. *Modrovich v. Allegheny County, Pa.*, 385 F.3d 397, 400 (3d Cir. 2004) (citing *Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985)).

foster an excessive government entanglement with religion." *Id.* at 612-13 (internal citations and quotations omitted).

Addressing the first prong, it is clear that the school's actions in preventing the reading of the Bible to the kindergarten class had a secular purpose. The only evidence relating to the school district's motives indicates that the school acted in order to avoid violating the Establishment Clause. Plaintiff herself testified that Principal Cook told her she could not read from the Bible because reading the Bible to the class would be "against the law . . . of separation of church and state." (Busch Dep. at 139-40.) Cook explained (and then-Superintendent Mesaros agreed) that he determined that it was improper to read from the Bible to a class of kindergarten students because he felt that it would be improperly "promoting religion and . . . proselytizing for promoting a specific religious point of view." (Cook Dep. at 105-06.) The school's intention, to avoid an Establishment Clause violation by avoiding the perception of school endorsement of a particular religious point of view, is inherently secular. *See Roberts*, 921 F.2d at 1054 (affirming district court's finding that "the school district had a secular purpose for its actions, namely, to assure that none of [teacher's] classroom materials or conduct violated the Establishment Clause"); *see also Peck*, 426 F.2d at 634 ("While . . . avoidance of the perception of religious endorsement [] is no doubt involved with religion, such a goal does not bespeak an intent to inhibit religion itself.").[24]

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[24] Plaintiff argues that preventing proselytizing in the classroom is not a secular purpose and that Defendants' actual

The second prong, that the principal or primary effect of the action must not advance or inhibit religion, is also clearly met in this case. This prong of the *Lemon* test "is not satisfied if official action, regardless of its purpose, 'conveys a message of endorsement or disapproval' of religion." *Id.* at 1054-55 (quoting *Wallace v. Jaffree*, 472 U.S. at 56 n.42) (citing *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)). Plaintiff contends that "allowing Wesley to share his love of the Bible would not have advanced religion over non-religion" and that "prohibiting Wesley's expression inhibited religion." (Doc. No. 20 at 22.) In fact, the school did not prevent Wesley or his mother from expressing their love of the Bible and their commitment to their religion. Plaintiff did

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intent for *Lemon* purposes remains a question of fact. (Doc. No. 20 at 22 n.9.) On the first count, we disagree – preventing the promotion of a religious point of view in a context that would be perceived as school endorsed is certainly a secular purpose.

On the second count, Plaintiff does not fully describe what she deems to be the dispute of fact regarding the school's motivation. There is no evidence that Principal Cook acted based on any motivation other than that of preventing the promotion of a religious viewpoint in the classroom. Plaintiff's characterization of the school's actions as expressing a hostility to Christianity is merely a characterization, with no evidence to support it. Furthermore, Wesley's ability to present his poster to the class and describe the significance of the picture of the church and the words "I love to go to the House of the Lord" or "I like to go to church" certainly undermines Plaintiff's unsupported allegation that the school's actions demonstrate a hostility towards Christian expression. *See Peck*, 426 F.3d at 634 (noting that school's display of poster with church on it cuts against plaintiff's "bare allegation that the [School] District's actions were intended to demonstrate hostility toward religion.").

not seek to come to Wesley's class to tell the other students about her time with Wesley reading the Bible or the role of religion in their family life. She sought instead to read verses from the Bible to the kindergarten students.[25] As previously discussed, the likelihood that this activity would be perceived by such young students as a school endorsement of the Bible was significant. Thus, the effect of the Bible reading, had the school allowed it, would, in fact, have violated the second prong of the *Lemon* test by "conveying a message of endorsement" of a particular religious belief. On the other hand, the prevention of the Bible reading had a purely neutral effect. In preventing Plaintiff's Bible reading, Principal Cook spoke with the teacher and then Plaintiff in the hallway, away from the children. The students were not told that Plaintiff had planned a different reading. Plaintiff requested and was given a new book to read to the class so that she could still participate in Wesley's "All About Me" week. In sum, the school's actions did not have the effect of

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[25] Plaintiff also contends that the school invited Wesley and his mother to share an interest "so long as the interest did not pertain to religion" and in so doing "endorsed non-religion over religion." (Doc. No. 20 at 23.) This is not a proper characterization of the undisputed facts. The school did not prevent Wesley from sharing any interest related to religion. In fact, the school permitted him to share his poster with the class and describe why he had placed a picture of a church on that poster. During the course of the year, the class discussed numerous holidays, including Christmas, Easter, Passover, Hanukkah, and Kwanza. However, as will be explained in more detail *infra*, there is an important distinction between discussing religion and reading the Bible to young students in the classroom. The school, justifiably, prevented only the latter.

advancing or inhibiting religion but merely sought to avoid a constitutional violation.

Plaintiff contends that in allowing Mrs. Lipski to speak to the class about Hanukkah and Passover but preventing Plaintiff from reading the Bible, the primary effect must have been to send a message of exclusion to Christians and Christian expression. Plaintiffs add that the School District's policy, allowing a "holiday tree" without religious ornamentation, allowing religious symbols to be displayed together, and prohibiting a crèche or nativity scene further excludes Christian expression. Plaintiffs' argument "sweeps much too broadly" and fails to note the relevant distinctions at play. *Roberts*, 921 F.2d at 1055. The school allows discussions of religion, displays of religious symbols when placed together and sensitively planned, and discussions of cultural elements of religious celebrations. It does not ban all Christian expression but rather seeks to ensure that the manner in which religion is raised in the school comports with the Establishment Clause in that it does not give the impression that the school is endorsing a particular religious point of view. As the Tenth Circuit explained:

> [T]he Establishment Clause focuses on the manner of use to which materials are put; it does not focus on the content of the materials *per se*. . . . It is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references in order to prevent teachers from inculcating specific religious values. Instead, school officials must be allowed, within certain bounds, to exercise discretion in determining what mate-

> rials or classroom practices are being used appropriately.

Id. It is clear that Defendants' actions in preventing the Bible reading did not have the effect of advancing or inhibiting religion.

Finally, Defendants' actions satisfied the third prong in that they did not foster an excessive government entanglement with religion. We observe that the mere request that Plaintiff not read from the Bible certainly did not, in and of itself, cause excessive entanglement with religion. Its purpose and effect was to avoid just such a constitutional violation. Plaintiff contends that it is Defendants' lack of "a coherent policy governing parental participation in classroom activities or religious expression" and the resulting *ad hoc* decisions that cause excessive entanglement when the school as a government entity must scrutinize speech to determine "how much religion is too much." (Doc. No. 20 at 26-27.) We disagree with Plaintiff's characterizations of the school's actions in this regard. The school is not seeking to determine when the quantity of religious expression exceeds some benchmark, but rather it focuses on the type of expression, the context of that expression, and the way in which religious materials are used. All of these guidelines are not only acceptable but required under the Establishment Clause.

Nevertheless, Plaintiff is correct that decisions on religious expression tend to be made on an *ad hoc* basis. Unfortunately, this results not from the school's lack of a clear policy, but instead from the fact-intensive nature of each inquiry and the somewhat confounding treatment of these questions by the courts. While this opinion may provide some

guidance to educators, we have no doubt that this area will remain confusing and will always require an individualized approach. Educators in public schools are called upon to make difficult distinctions between permissible cultural or religious expression and impermissible religious promotion. These decisions must be made based on the identity of the speaker, the context of the speech, the age of the listeners, and the way in which the religious content is delivered and likely to be heard. No policy will prevent such fact intensive inquiries. While it is unfortunate that each analysis must be so complicated, a school's effort to abide by the somewhat hazy requirements of the Establishment Clause does not, on its own, create excessive entanglement with religion. Were that the case, every municipality or government agency would violate the Clause every time it made decisions about holiday decorations or funding for religious entities. Government must be free to grapple with these questions without violating the Constitution by having the discussion. Accordingly, we are compelled to conclude that the school satisfied the third prong of the *Lemon* test and did not, by its actions, violate the Establishment Clause of the First Amendment. We will grant Defendants' Motion for Summary Judgment on this claim.

C. Equal Protection Claim

Plaintiff argues, in addition to her Free Speech and Establishment Clause claims, that Defendants also denied her and Wesley equal protection of the laws.[26] Plaintiff contends that in allowing other

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[26] Pennsylvania courts evaluate equal protection claims under the Pennsylvania Constitution, Pa. Const., Art. I, §§ 1, 26, under the same standards applicable to equal protection

parents and students of non-Christian faiths to share religious traditions during classroom activities, Defendants subjected her and her son to disparate treatment in violation of the Fourteenth Amendment. While Plaintiff does not point to specific instances of disparate treatment and instead incorporates her entire brief by reference, we assume the equal protection claim to be focused on Mrs. Lipski's two presentations to the class about Hanukkah and Passover respectively. If these presentations were permitted, Plaintiff argues, Busch's reading of the Bible should have been allowed as well.[27] Defen-

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claims under the Fourteenth Amendment to the Federal Constitution. *Asian-American Licensed Beverage Ass'n v. Commonwealth of Pennsylvania*, No. Civ. A. 05-CV-213 5, 2005 WL 3077246, at *4 n.3 (M.D. Pa. Nov. 3, 2005) (citing *Harrisburg v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003) ("[T]he meaning and purpose of the Equal Protection Clause of the United States Constitution and the State's prohibition against special laws, are sufficiently similar to warrant like treatment, and contentions concerning the two provisions should be reviewed simultaneously") (citations omitted)). As a result, this section applies to both of Plaintiff's equal protection claims (Counts V and VI).

[27] In addition, throughout their brief, Plaintiff makes reference to the School Board Policy that allowed some religious symbols to be displayed sensitively together but prohibited a crèche or nativity scene. Plaintiff has pointed out that symbols of Hanukkah, including a menorah and dreidel, were used on activity sheets but the school's policy allowed only a "holiday" tree with secular ornaments to be placed in a central location in the school. Principal Cook made clear that teachers and students were free to refer to the tree as a Christmas tree if they so desired. In addition, Reilly displayed a picture of a Christmas tree in her classroom and read numerous stories with Christmas and Hanukkah themes to her class.

dants counter that no other parent presentations during "All About Me" week involved religious expression. However, this fact is irrelevant to the equal protection determination. Whether or not the parents of other faiths presented to the class as part of the same curricular program is not determinative, and Defendants' contention views the issue through too narrow a lens. Nevertheless, we are not persuaded that Defendants' actions throughout the course of the year in allowing some parent presentations but not others violated the Equal Protection Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).[28] Thus, the first question in

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While we do not view these examples as the basis of an equal protection claim (both because they have not been sufficiently developed in the record and because the school appears to display both Hanukkah and Christmas symbols), we note that it is simply ludicrous to refer to the Christmas tree as a "holiday" tree. The school and, as will be discussed *infra*, the Supreme Court of the United States consider the Christmas tree to be a secular symbol of the Christmas holiday. If the school makes the choice to display it, it should justify that choice based on applicable law but should not try to avoid it by masking its choice in secular language.

[28] The Seventh Circuit has commented that in terms of discrimination between religious groups, the First Amendment provides the primary source of protection while the equal protection clause merely demands that such distinctions not be arbitrary. *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988)

this analysis must focus on whether the school's actions dealt with similarly situated people. In the circumstances presented by this case, we are compelled to conclude that they did not.

When questioned about why the teacher and principal permitted Mrs. Lipski's presentations but would not permit Busch's Bible reading, Principal Cook made it clear that he viewed those presentations as acceptable discussions of Jewish culture within the context of the curriculum. (Cook Dep. at 91, 93-94 ("I think that when the menorah was presented it was presented in a way which was related to the curriculum in terms of its importance historically and culturally.").) The Supreme Court has made clear that it is impermissible for the government to celebrate Christmas or any other holiday as a religious holiday because that would be government endorsement of a particular religious point of view. *See County of Allegheny*, 492 U.S. at

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("This is not because discrimination between religions is deemed on a constitutional par with those purely 'economic' discriminations that the equal protection clause, in modern interpretations, treats so leniently, but because the religious dimension of the discrimination is governed by the religion clauses of the First Amendment, leaving for the equal protection clause only a claim of arbitrariness unrelated to the character of the activity allegedly discriminated against.").

Clearly, a state law granting a denominational preference without a compelling interest would violate the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) ("The First Amendment mandates government neutrality between religion and religion. . . . In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." (internal citations and quotations omitted)).

611 ("If the government celebrates Christmas as a religious holiday . . . it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief."). However, government may celebrate a holiday associated with one religion if it is "confin[ed] . . . to the holiday's secular aspects." *Id.* In *County of Allegheny*, the Court concluded that it was impermissible to place a crèche with a banner stating "Glory to God in the Highest!" in the main part of the county courthouse because in doing so "the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." *Id.* at 600. The Court also noted that a display of a menorah may present "a closer constitutional question" because "the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions." *Id.* at 613-14. Similarly, the Court commented that "[a]lthough Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas." *Id.* at 616. Thus, in reaching the conclusion that the crèche display at issue violated the Establishment Clause whereas the menorah and Christmas tree display did not, the Court made a subtle but important distinction that educators in public schools must regularly make. Based on the "unique circumstances" involved in each instance, the Court concluded that some displays can be permissible cultural representations while others carry an impermissible message of government endorsement of religion. *See id.* at 595,

621;[29] *see also Bible Reading in Pub. Sch.*, 30 Pa. D. &. C.2d 643, 649 (recognizing the difference between teaching about religion and the teaching of religion).

The same is true of the distinctions made by Defendants in this case. While Plaintiff contends that Defendants committed an equal protection violation, they offer no evidence to suggest that the presentations by Mrs. Lipski to the kindergarten class were anything but secular, cultural lessons about the holidays. While it is true that both Hanukkah and Passover are Jewish holidays, the presentations themselves did not in any way promote a religious viewpoint. For Hanukkah, Mrs. Lipski brought in a menorah and dreidel to show the class and read a story from the "Blue's Clues Hanukkah" book. Similarly, for Passover, Mrs. Lipski brought in matzah ball soup for the children to taste if they wished and read *The Matzah Ball Fairy*, a fanciful children's story about a food typically eaten on that holiday. The Hanukkah presentation was permitted as part of the social studies curriculum in which Reilly discussed the holidays of Christmas, Hanukkah, and Kwanza. Similarly, Reilly set up the presentation on Passover by discussing the spring holidays of Easter and Passover. In each instance, the context of the presentation made it clear that the information was being presented to the students as part of their education

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[29] The *County of Allegheny* Court also noted that its view of the menorah as a secular symbol could be altered were it presented in a different context. *County of Allegheny*, 492 U.S. at 621 n.70 ("[N]othing in this opinion forecloses the possibility that on other facts a menorah display could constitute an impermissible endorsement of religion.").

on various religions and cultures. In contrast, Plaintiff's intended Bible reading had none of these elements. As part of a "show and tell"-type exercise and without explanation or context, Plaintiff sought to read verses from the Bible to the kindergarten class. Rather than teaching about religion, such an exercise could easily be perceived as being an endorsement of religion. While it is subtle, this distinction is all-important. Mrs. Lipski and Plaintiff were not similarly situated because their presentations differed in content, form, and context in ways that justifiably impacted the school's decision in each case. As a result, the different treatment each received did not give rise to an equal protection violation.[30] Accordingly, we are compelled to grant Defendants' Motion for Summary Judgment on this claim as well.

An appropriate Order follows.

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[30] We note again that the deposition testimony of Principal Cook and Reilly included numerous questions regarding hypothetical situations that asked these witnesses to determine whether they would permit certain presentations on religious topics and if not, how those presentations differed from others that were permitted. While we have considered the testimony on these topics, we will not make legal determinations based on witness's opinions in response to hypothetical questions. We decide the equal protection claim based only on the actual occurrences in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 05-CV-2094

DONNA KAY BUSCH, in her individual capacity and as the parent and next friend of Wesley Busch, a minor,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*

ORDER

AND NOW, this 31st day of May, 2007, upon consideration of Plaintiff Donna Kay Busch's Motion For Partial Summary Judgment (Doc. No. 20), Defendants Marple Newtown School District, Marple Newtown School District Board of Directors, Robert Mesaros, and Thomas Cook's Cross-Motion For Summary Judgment (Doc. No. 19), and all papers submitted in support thereof and in opposition thereto, it is ORDERED as follows:

1. Plaintiff's Motion for Summary Judgment (Doc. No. 20) is DENIED.
2. Defendants' Motion for Summary Judgment (Doc. No. 19) is GRANTED.
3. Judgment is entered in favor of Defendants and against Plaintiff.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick
R. Barclay Surrick, Judge